HCMP003961/1996

1996 M.P. No. 3961

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

BETWEEN

CHIENG A LAC and 1375 others	Applicants
and	
(1) THE DIRECTOR OF IMMIGRATION	Respondents
(2) THE SUPERINTENDENT OF WHITEHEAD DETENTION CENTRE	
(3) THE SUPERINTENDENT OF HIGH ISLAND DETENTION CENTRE	
(4) THE SUPERINTENDENT OF LAI CHI KOK RECEPTION CENTRE	
(5) THE SUPERINTENDENT OF VICTORIA PRISON	
(6) THE SUPERINTENDENT OF KAI TAK VIETNAMESE MIGRANT TRANSIT CENTRE	

Coram: The Hon. Mr. Justice Keith in Court

Dates of Hearing: 7th-10th, 13th-16th, 20th-24th and 27th January 1997

Date of Delivery of Judgment: 5th February 1997

[(i) The implied limitations on a statutory power of detention, formulated in *R.v.*

Governor of Durham Prison ex p. *Hardial Singh* [1984] 1 WLR 704, and applied to the Director of Immigration's power to detain asylum-seekers from Vietnam under section 13D(1) of the Immigration Ordinance (Cap. 115)("the Ordinance") by *Tan Te Lam* v. *The Superintendent of Tai A Chau Detention Centre* [1996] 2 WLR 863, are not affected by section 13D(1AA) of the Ordinance.

(ii) The words "pending his removal from Hong Kong" in section 13D(1) of the Ordinance mean "until his removal from Hong Kong" and not "in order to facilitate his removal from Hong Kong".

(iii) The word "arrangements" in section 13D(1A)(b)(ii) of the Ordinance includes arrangements which have been made for the removal of Vietnamese asylum-seekers in general from Hong Kong. It is not limited to arrangements which are specific to individual detainees. Accordingly, the Voluntary Repatriation Scheme, which was devised to give effect to Hong Kong's obligations under the Comprehensive Plan of Action, constitutes "arrangements" within the meaning of section 13D(1A)(b)(ii).

(iv) Section 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383) does not prevent the Bill of Rights from applying to the detention of detainees who are detained under section 13D(1) of the Ordinance.

(v) The detention of Vietnamese asylum-seekers under section 13D(1) of the Ordinance does not amount to "arbitrary" detention contrary to Art.5(1) of the Bill of Rights. It is neither capricious, whimsical nor unjustified.

(vi) By virtue of section 13D(1A) of the Ordinance, the conditions in which a detainee is detained can render his detention unlawful, but only to the extent that those conditions mean that the period of time in which he has been in detention has become unreasonable.]

INDEX

JUDGMENT

INTRODUCTION

The thousands of people who have fled Vietnam since the fall of Saigon in 1975 have been called many things. They used to be called the boat people. For a while, they were simply called migrants. At present, the tendency is to call them asylum-seekers. But they are called that more in hope than in expectation. The vast majority of those who have fled to Hong Kong have not been granted refugee status. They are returned to Vietnam. Pending their removal from Hong Kong, they are held in detention. In these proceedings for writs of habeas corpus, 1,376 of them have applied for their release.

This is not the first time that an attempt has been made to challenge the legality of the detention in Hong Kong of asylum-seekers from Vietnam. A similar attempt was made in *Re Chung Tu Quan*.[1] The case eventually ended up in the Privy Council. By then, it had come to be called *Tan Te Lam v. The Superintendent of Tai A Chau Detention Centre*.[2] However, much has happened since *Chung Tu Quan*. The legislation which underpins the detention of Vietnamese asylum-seekers in Hong Kong has been amended. New procedures for returning them to Vietnam have been introduced. The pace of their return has increased dramatically in recent months, and the number of those who remain in detention has significantly reduced. But no-one denies that the number of those who remain in detention is still high.[3] Although there is now an end in sight to the burden which Hong Kong has been shouldering in accommodating and dealing with them, the fact remains that an unacceptably large number of people have been in detention for far too long.

THE HISTORICAL BACKGROUND

The legality of the Applicants' detention cannot be determined without an understanding of the historical context in which they are being detained. The facts which caused them to be detained in the first place, and the factors which have contributed to their prolonged detention since then, are highly material to whether their current detention is lawful. In *Chung Tu Quan*, I attempted to relate the history of the migration to Hong Kong of asylum-seekers from Vietnam,[4] and the steps taken to repatriate them to Vietnam.[5] I do not propose to reproduce those passages in this judgment. This judgment should be read as incorporating them. However, it is necessary for me to bring matters up to date, and to recount the attempts made by the Government of Hong Kong to repatriate asylum-seekers from Vietnam in the two years or so since *Chung Tu Quan*.[6]

---

[1] [1995] 1 HKC 566

[2] [1996] 2 WLR 863

[3] Indeed, the 1,376 Applicants are said to represent an estimated 4,000 members of their families who were still in detention in Hong Kong when these proceedings were commenced

[4] Ibid., pp.570B-572E

[5] Ibid., pp.576D-579D

[6] Unless otherwise stated, all references in this judgment to sections of an Ordinance are references to sections of the Immigration Ordinance (Cap. 115), and all references to "the Director" are references to the Director of Immigration

THE SIMPLIFIED PROCEDURE

In March 1995, a new procedure for the repatriation of asylum-seekers who had not been accorded refugee status was agreed at a meeting of the Steering Committee of the International Conference on Indo-Chinese Refugees. The aim was for the Comprehensive Plan of Action to be finally implemented by the end of 1995, though it was recognised that the large number of Vietnamese asylum-seekers still in Hong Kong meant that that target was unlikely to be achieved by the Government of Hong Kong. The principal feature of this new procedure was that it applied to all asylum-seekers, whether they had volunteered for repatriation to their country of origin or not. However, the difference which had hitherto existed between the rate of return of detainees under the Voluntary Repatriation Scheme and of detainees under the Orderly Repatriation Programme would not necessarily be eliminated. Detainees who applied for voluntary repatriation would continue to be interviewed by the Vietnamese delegation based in Hong Kong, and that continued to be likely to accelerate their return.

Under this simplified procedure, the personal particulars of all detainees would be submitted by the Vietnamese Refugees Branch of the Immigration Department to the Vietnamese authorities through the UNHCR as soon as possible. These particulars would be processed by the Vietnamese authorities who would then inform the Immigration Department through the UNHCR which of the detainees were cleared to return. In those cases where the Vietnamese authorities needed further information about particular detainees, Vietnamese officials in Hong Kong would gather the information locally - if necessary, by interviewing the detainees in the presence of officers from the Immigration Department and the UNHCR. Two particular features of this streamlined procedure should be noted. First, where the personal particulars of a detainee had already been submitted to the Vietnamese authorities under the Orderly Repatriation Programme, it would not be necessary for the particulars to be submitted again. Secondly, it would nevertheless be necessary for the particulars to be submitted of detainees who had previously applied for voluntary repatration but whose applications were still pending.

By the end of July 1995, the personal particulars of all detainees had been submitted by the Immigration Department to the Vietnamese authorities.[7] This was well ahead of the target which the Immigration Department had been working to at the end of 1994. At that time, it had aimed to submit the particulars of all detainees by the end of 1995, which would have been well ahead of the prevailing capacity of the Vietnamese authorities to process them.

THE RECENT RATE OF REPATRIATION

The simplified procedure has been matched by an increased willingness on the part of the Vietnamese authorities to increase the rate of repatriation to Vietnam. A number of technical meetings have taken place between officials of the Hong Kong and Vietnamese Governments to discuss the implementation of the repatration programme, and to resolve

[7] The number of particulars submitted under the simplified procedure was 9,115

such difficulties as arise from time to time. As a result, the number of detainees returned to Vietnam has increased significantly in the last year. Almost 15,000 detainees were repatriated to Vietnam in 1996, almost 6,000 of them being returned in the last three months of 1996. By the time the hearing before me commenced, there were only about 5,800 detainees still in Hong Kong. Of these, about 2,800 had been cleared for return. They were therefore waiting to be included on one of the flights for returnees, or cannot be returned yet because, for example, they are pregnant or ill, or involved in litigation, or awaiting clearance for members of their family. Only about 3,000 detainees have not yet been cleared for return by the Vietnamese authorities.

The current pace of the repatriation programme has been reflected in the fate of the Applicants. Of the 1,376 Applicants, 461 had been repatriated to Vietnam by 23rd January, and a further 255 had been cleared by the Vietnamese authorities to return but were awaiting repatriation. Only 659 of the Applicants had still not been cleared for repatriation.[8]

THE LEGISLATIVE FRAMEWORK

In *Chung Tu Quan*, I described the history of the legislation which has authorised the detention in Hong Kong of asylum-seekers from Vietnam.[9] Again, I do not propose to reproduce that passage in this judgment. This judgment should be read as incorporating it. However, it is again necessary for me to bring matters up to date, and to explain what is said to be an important legislative amendment passed recently.

In *Chung Tu Quan*, the factual question was whether there was a reasonable prospect of the Applicants being removed from Hong Kong in the foreseeable future. The Applicants asked me to find that the Vietnamese authorities were not prepared to accept detainees in Hong Kong who were not regarded as nationals. Since the Vietnamese authorities regarded each of the Applicants as Taiwanese nationals, it was unlikely that they would be accepted back. The Respondents asked me not to make that finding. They pointed to examples of detainees who had come within the category of persons who were regarded by the Vietnamese authorities as not having Vietnamese nationality, but who nevertheless had been accepted by the Vietnamese authorities for repatriation. There had been no express refusal by the Vietnamese authorities to take back the Applicants. Accordingly, whether the Applicants would be accepted was something which could not be known until it was put to the test.

In relation to three of the Applicants, I decided this factual question in their favour. This finding of fact was not disturbed in *Tan Te Lam*. It is this issue which the recent

[8] The one remaining Applicant has been permitted to remain in Hong Kong as she has married someone who is a Hong Kong permanent resident with the right of abode in Hong Kong

[9] Ibid., pp.572F-576E

legislative amendment addresses. A new section has been added between sections 13D(1) and 13D(1A).[10] It is section 13D(1AA). It took effect on 31st May 1996. It reads:

> "Subject to subsections (1AB) and (1AC), where -
>
> (a) a person is being detained pending his removal from Hong Kong; and
>
> (b) a request has been made to the Government of Vietnam by -
>
> (i) the Government of Hong Kong; or
>
> (ii) the United Nations High Commissioner for Refugees acting through his representative in Hong Kong,
>
> for approval to remove the person to Vietnam, for the purposes of detention under subsection (1), 'pending removal' includes awaiting a response to the request from the Government of Vietnam."

In other words, the detention of a detainee will be treated as being pending his removal from Hong Kong until such time as the Vietnamese authorities expressly state whether or not the detainee has been accepted for repatriation. I shall return to the other new sections - sections 13D(1AB) and 13D(1AC) - in due course.

THE *HARDIAL SINGH* PRINCIPLES

In *R.* v. *The Governor of Durham Prison ex p. Hardial Singh*,[11] Woolf J.(as he then was) decided that a statutory power of detention pending removal was subject to various limitations. In *Tan Te Lam*, the Privy Council held that these limitations applied to the power of detention pending removal conferred by section 13D(1). The Privy Council also held that it was open to the legislature to vary or even to exclude these limitations by express provision, subject to any constitutional challenge. The enactment of section 13D(1AA) therefore raises the question: what effect, if any, does it have on the *Hardial Singh* principles?

For this purpose, it is necessary to identify what the *Hardial Singh* principles are. In *Tan Te Lam*, the Privy Council identified three distinct principles:[12]

> (i) A power of detention is to be regarded as limited to a period which is reasonably necessary to achieve the purpose for which the power was granted. Accordingly, if the power to authorise the detention of asylum-seekers from Vietnam was granted to the Director to enable them to be detained until their removal from Hong Kong was effected, the power of detention is limited to such time as is reasonably necessary to effect their removal from Hong Kong.

---

[10] Immigration (Amendment) Ordinance (No.33 of 1996) ("the 1996 Ordinance")
[11] [1984] 1 WLR 704
[12] Ibid., p.873D-E

(ii) A power of detention is to be regarded as limited to those cases in which the purpose for which the power was granted can be achieved within a reasonable time. Accordingly, when it becomes apparent that a detainee's removal from Hong Kong is not going to be possible within a reasonable time, the detention can no longer be authorised.

(iii) The person under whose authority people are being detained must take all reasonable steps within his power to ensure that the purpose for which the detention was authorised is achieved within a reasonable time. Accordingly, the Director must take all reasonable steps within her power to ensure that the detainees' removal from Hong Kong is achieved within a reasonable time.

I agree with Ms. Gladys Li Q.C. for the Applicants that section 13D(1AA) does not in any way limit any of these three principles. That is because section 13D(1AC) provides:

> "For the ... avoidance [of doubt], nothing in subsection (1AA) shall prevent a court, in applying subsection (1A), from determining that a person has been detained for an unreasonable period."

Thus, if the time that a detainee has been detained is unreasonable because (a) he has been detained for longer than was reasonably necessary to achieve his removal from Hong Kong (principle (i)), or (b) his detention has continued despite the fact that he cannot be removed from Hong Kong within a reasonable time (principle (ii)), or (c) the Director has not taken reasonable steps to achieve his removal within a reasonable time (principle (iii)), section 13D(1AA) cannot be relied upon to limit the application of these principles to the power of detention conferred by section 13D(1). All that section 13D(1AA) does is to provide that a detainee's detention does not cease to be "pending his removal from Hong Kong" simply because a response has not been received from the Vietnamese authorities to a request to accept him for repatriation. In view of what I shall be finding is the proper construction of the words "pending his removal from Hong Kong", section 13D(1AA) has in my judgment little, if any, practical effect.

A FOURTH LIMITATION

Ms. Li contended that in ***Hardial Singh*** Woolf J. identified a fourth limitation on the statutory power of detention. The statutory power of detention to which the ***Hardial Singh*** case related was the power of the Secretary of State to detain someone "pending the making of a deportation order" and "pending his removal or departure from the United Kingdom". Woolf J. said:[13]

[13] Ibid., p.706D

> "[The Secretary of State] can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose."

Accordingly, Ms. Li argued that that there is a fourth limitation on a statutory power of detention, and that relates to its purpose. A power of detention can only be exercised for the purpose for which the power was granted. It cannot be exercised for any other purpose.

The Privy Council did not expressly identify this limitation as being one of the implied limitations on the statutory power of detention. That, no doubt, was because the purpose of the Director in exercising his power of detention was not an issue in *Tan Te Lam*. I certainly had not regarded it as an issue in *Chung Tu Quan*, which was why I did not reproduce in my judgment the particular passage in Woolf J.'s judgment on which Ms. Li relied. However, I agree with Woolf J. that a statutory power of detention should be subject to this limitation. If a statutory power of detention has been conferred for a particular purpose, it can only be exercised for that purpose.

In these circumstances, it is necessary to identify for what purpose the statutory power of detention conferred by section 13D(1) was conferred. Ms. Li argued that since the power is exercisable "pending [the asylum-seeker's] removal from Hong Kong", the power cannot be exercised for any purpose other than to facilitate his removal from Hong Kong. This argument assumes that the words "pending [the asylum-seeker's] removal from Hong Kong" mean "in order to facilitate the asylum-seeker's removal from Hong Kong".

This is where I find myself in fundamental disagreement with Ms. Li's argument. In my view, the purpose of the power of detention was not to facilitate the asylum-seekers' removal from Hong Kong, but to ensure that they remained in detention while attempts were made to effect their removal from Hong Kong. In other words, I read the words "pending [the asylum-seeker's] removal from Hong Kong" as meaning "until the asylum-seeker's removal from Hong Kong".[14] Thus, it would, of course, be open to the Director to authorise the detention of Vietnamese asylum-seekers on the basis that their detention would facilitate their removal, but it would also be open to the Director to authorise their detention, for example, in order to deter other Vietnamese from coming to Hong Kong. Such a policy may be susceptible to challenge on the grounds of *Wednesbury* unreasonableness, but no such challenge has been mounted. If it had been, I would have rejected it.

I make three comments on this reading of the power of detention conferred by section 13D(1):

---

[14] That accords entirely with the view expressed on similar statutory language by Linden J. in the Ontario High Court of Justice in *Re Rojas* 40 C.C.C. (2d) 316, a decision subsequently approved by the Ontario Court of Appeal, 41 C.C.C. (2d) 566

(i) I believe that that was what the Court of Appeal had in mind in *Tan Te Lam*.[15] The Privy Council did not criticise this view of the Court of Appeal. What it rejected was the Court of Appeal's view, *inter alia*, that the *Hardial Singh* principles relating to the length of detention had no application to the statutory scheme under Part IIIA of the Immigration Ordinance.

(ii) Had the Privy Council thought that the words "pending [the asylum-seeker's] removal from Hong Kong" meant "in order to facilitate his removal from Hong Kong", it would surely have said so. In the course of my judgment in *Chung Tu Quan*. I had specifically referred to the reasons behind the adoption by the Director of the policy of detaining asylum-seekers pending their removal from Hong Kong.[16] Those reasons had nothing to do with facilitating their removal from Hong Kong. They related to the undesirability of persons who had been found not to be refugees being released to live and work in the community. The Government would in those circumstances have lost de facto control over immigration into Hong Kong from Vietnam. Any other policy would be unacceptable to the people of Hong Kong, and would be a threat to public order and security. The evidence before me suggests that those reasons remain the reasons for the policy today. The fact that the Privy Council did not regard these reasons for the policy of detention as being significant suggests that the Privy Council regarded the words "pending [the asylum-seeker's] removal from Hong Kong" as meaning "until his removal from Hong Kong" rather than "in order to facilitate his removal from Hong Kong".

(iii) It is against that background that section 13D(1AB) has to be seen. That provides:

> "For the avoidance of doubt, nothing in subsection (1AA) shall be interpreted as giving authority to the Director under subsection (1) to detain a person for a purpose other than pending his removal from Hong Kong".

What this provides, therefore, is that the fact that a response to a request for the detainee's repatriation has not yet been received from the Vietnamese authorities will not justify the detainee's continued detention if the detainee's removal from Hong Kong can no longer be effected. I do not regard this provision as in any way limiting principle (iv) of the *Hardial Singh* principles, or any of the other principles for that matter.

THE CONSTRUCTION AND APPLICATION OF SECTION 13D

---

[15] [1995] 3 HKC 339

[16] Ibid., p.590B-E

I have, both in this judgment so far and in my judgment in *Chung Tu Quan*, addressed a number of questions arising on the construction and application of section 13D. However, a number of additional submissions on the construction and application of section 13D were advanced by Ms. Li. To the extent that the issues to which her submissions related have not been addressed before, I propose to deal with them now.

(1) Section 13D(1A)(b)(i)

This provision cannot be construed to render a period of detention reasonable simply because during that period it has not been possible to make arrangements for the detainee's removal for reasons outside the Director's control. The effect of this provision is to make the extent to which it has been possible to make arrangements for the detainee's removal merely a factor in deciding whether the period of detention is reasonable or not.

(2) Section 13D(1A)(b)(ii)

This provision requires the court to take into account, as a factor in determining whether the period of the detainee's detention pending his removal from Hong Kong has been reasonable, "whether or not the person has declined arrangements made or proposed for his removal". Focusing on the references to "the person" and "for his removal", Ms. Li contended that specific arrangements for an individual detainee's removal from Hong Kong must have been made and proposed, and the individual detainee must have declined those specific arrangements, before this provision comes into play.

I cannot accept this argument. I see no warrant for limiting the nature of the arrangements contemplated by this provision to arrangements which are specific to individual detainees. The number of Vietnamese asylum-seekers in Hong Kong who were being refused refugee status, and whose removal from Hong Kong could only be effected by their repatriation to Vietnam, meant that schemes for their repatriation to Vietnam had to be devised. The scheme which was devised to give effect to the obligations of the Government of Hong Kong under the Comprehensive Plan of Action was the Voluntary Repatriation Scheme. It is true that the Voluntary Repatriation Scheme was an arrangement which had made for the removal of asylum-seekers in general from Hong Kong, but that did not mean that it was not also an arrangement which had been made for the removal of each individual asylum-seeker still in Hong Kong.

The Privy Council took the view that the Voluntary Repatriation Scheme constituted "arrangements" within the meaning of this provision:[17]

[17] Ibid., p.876F-H *per* Lord Browne-Wilkinson

> "The large majority of those in detention do not wish to return to Vietnam and have declined to apply for voluntary repatriation. The evidence shows that, if they did so apply, most of them would be repatriated in a comparatively short time, thereby regaining their freedom. It follows that, in such cases, the Vietnamese migrant is only detained because of his own refusal to leave Hong Kong voluntarily, such refusal being based on a desire to obtain entry to Hong Kong to which he has no right. In assessing the reasonableness of the continuing detention of such migrants, section 13D(1A)(b)(ii) requires the court to have regard to 'whether or not the person has declined arrangements made or proposed for his removal'. In their Lordships' view the fact that the detention is self-induced by reason of the failure to apply for voluntary repatriation is a factor of fundamental importance in considering whether, in all the circumstances, the detention is reasonable".

These remarks were obiter because the Privy Council did not decide the "length of detention" issue, but I regard them as powerful support for the construction which I have placed on the word "arrangements". In addition, it is noteworthy that in this passage the Privy Council confirmed what I had found in *Chung Tu Quan*, namely that the Voluntary Repatriation Scheme is a fast-track programme, and that volunteering for repatriation accelerates a detainee's return to Vietnam.

I do not overlook Ms. Li's argument that arrangements cannot be made for an individual detainee's removal from Hong Kong until the Vietnamese authorities have cleared him for repatriation. Accordingly, to the extent that such clearance is not affected by whether the detainee volunteers for repatriation, it is contended that a refusal to volunteer for repatriation does not affect such clearance, and cannot therefore affect the arrangements for his removal from Hong Kong. I reject the premise on which this argument is based. It is not the case that arrangements cannot be made for an individual detainee's removal from Hong Kong until he has been cleared for repatriation. That assumes that the arrangements contemplated by section 13D(1A)(b)(ii) are only the physical arrangements for his removal once the decision has been made that his removal can be effected. For the reasons I have given, I do not believe that there is any warrant for giving the word "arrangements" such a narrow construction.

Accordingly, section 13D(1A)(b)(ii) on its proper construction enables the court to take into account the refusal of a detainee to apply for voluntary repatriation in determining whether the period of detention pending his removal from Hong Kong has been reasonable. It is argued that, construed in that way, section 13D(1A)(b)(ii) is inconsistent with the Bill of Rights. Detainees are not obliged to volunteer for repatriation, and yet the effect of section 13D(1A)(b)(ii) is to penalise them for not doing so. The provision in the Bill of Rights on which reliance is placed is Art.5(1) which provides, so far as is said to be material:

> "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

I do not see how section 13D(1A)(b)(ii) is inconsistent with the rights guaranteed by this sentence in Art.5(1). Section 13D(1A)(b)(ii) "establishes" one of the grounds to be taken into account in determining whether the deprivation of a detainee's liberty is unlawful. It may be that the Applicants' advisers have in mind another sentence in Art.5(1):

> "No one shall be subjected to arbitrary ... detention".

The argument then would be that it is arbitrary to continue detaining a detainee for refusing to do that which he is in law entitled to refuse to do. I shall be addressing the question of arbitrary detention later in this judgment, but whatever arbitrary detention means, I do not see how detention which could be brought to an end by a detainee applying for voluntary repatriation becomes arbitrary simply because the detainee decides not to apply for it.

In the interests of compleness, I should add two things:

(i) Ms. Li contended that even if a refusal to apply for voluntary repatriation means that detainees have declined arrangements for their removal, a factor to be taken into account nevertheless is that the conditions in which detainees are detained could have caused or contributed to their inability to make rational decisions. I have borne that in mind in determining the appropriate weight to be given to a refusal to apply for voluntary repatriation.

(ii) There has been a considerable amount of evidence about why the number of asylum-seekers volunteering for repatriation has fluctuated over the years.[18] I do not comment on those reasons at all, because the popularity at any particular time of the Voluntary Repatriation Scheme amongst detainees in Hong Kong is not to the point. It may be that those who continue to be detained in Hong Kong have their own reasons for not volunteering for repatriation, but whether those reasons are good, bad or indifferent is irrelevant. What is relevant is that the Voluntary Repatriation Scheme exists, and is available for those who wish to take advantage of it.

(3) Section 13D(1B)

---

[18] The reasons are said to include the temporary suspension of the Orderly Repatriation Programme following the announcement by the Government of an inquiry into disturbances at a particular detention centre in April 1994, an increase in the re-integration assistance which the U.K. Government offered in 1994 to all those who volunteered for repatriation, the various initiatives in 1995 from the United States to accept asylum-seekers from Vietnam, and the litigation which has been commenced on behalf of many asylum-seekers from Vietnam by the Applicants' solicitors, whose interest in, and concern for, asylum-seekers from Vietnam who are detained in Hong Kong is well-known

This provision relates only to the detention of a detainee pending screening. It does not relate to the detention of a detainee pending his removal from Hong Kong. Accordingly, the legislature was not discouraging comparisons over the length of detention in individual cases in respect of detention pending their removal from Hong Kong. Thus, in determining whether the detention of any of the Applicants since they were refused refugee status has been for an unreasonable time, it is legitimate to compare his case with, for example, someone who has already been removed from Hong Kong, even though the date on which refugee status was finally refused in his case was later.

(4) Retrospectivity

Sections 13D(1A) and 13D(1B) came into effect on 31st May 1991: see section 2(1) of the Immigration (Amendment) Ordinance ("the 1991 Ordinance").[19] The 1991 Ordinance repealed the existing section 13D(1), and substituted for it a new section 13D(1), which included sections 13D(1A) and 13D(1B). Section 1(2) of the 1991 Ordinance shows that it was not intended to make section 2(1) operate retrospectively. That is because section 1(2) identified a particular section which was deemed to have come into operation prior to 31st May 1991, namely section 2(3). Because there was no reference to section 2(1) being deemed to have come into operation prior to 31st May 1991, the legislative intention was plainly not to give it retrospective effect. Accordingly, sections 13D(1A) and 13D(1B) are not retrospective in their operation.

The significance of that is this. Some of the Applicants have been detained pending their removal from Hong Kong pursuant to detention orders made prior to 31st May 1991. It is contended that sections 13D(1A) and 13D(1B) do not apply to their cases: the legality of their detention should be determined without reference to those sections. That is because the opening words of section 13D(1A) read:

> "The detention of a person under this section shall not be unlawful ..."

It is said that the words "under this section" show that the factors which section 13D(1A) requires the court to take into account relate only to persons detained under the new section 13D(1) substituted by the 1991 Ordinance, and not to persons detained under the old section 13D(1) which was repealed.

I cannot accept this argument. It assumes that those who were detained prior to 31st May 1991 pending their removal from Hong Kong continued to be detained under the old section 13D(1). That cannot be the case. The old section 13D(1) has been repealed. Since it has been repealed, it cannot be the statutory basis for the current detention of those who had originally been detained pursuant to it. On its repeal and its substitution by the new section 13D(1), the persons who had originally been detained under it must be treated as continuing to be detained under the new section 13D(1). Accordingly, if they are currently detained under the new section 13D(1), the new sections 13D(1A) and 13D(1B) must be taken into account in determining the legality of their current detention.

---

[19] No. 52 of 1991

It is this argument which disposes of Ms. Li's second submission. That was that even if sections 13D(1A) and 13D(1B) are to be taken into account in determining the legality of the current detention of those who were originally detained prior to 31st May 1991 pending their removal from Hong Kong, the 1991 Ordinance cannot retrospectively validate the original detention if it had already become unlawful by the date of its enactment. That argument may be correct so far as it goes, but even if their detention under the old section 13D(1) had become unlawful by 31st May 1991 and could not have been retrospectively validated, the question now is whether their new detention since 31st May 1991 under the new section 13D(1) is lawful.

These arguments are not affected by section 23(b) of the Interpretation and General Clauses Ordinance (Cap.1). So far as is material, that provides:

> "Where an Ordinance repeals ... in part any other Ordinance, the repeal shall not ... affect the previous operation of [the] Ordinance repealed or anything duly done ... under [the] Ordinance so repealed."[20]

That means that although the old section 13D(1) was repealed on 31st May 1991, its repeal did not affect the previous detention under that section. In other words, detention prior to 31st May 1991 was not affected by the repeal of the old section 13D(1). Section 23(b), however, does not have the effect of rendering the detention after 31st May 1991 as continuing to be under the old section 13D(1).

Ms. Li's arguments on retrospectivity were not limited to the 1991 Ordinance. They related to the 1996 Ordinance as well. She contended that section 13D(1AA), which was added to the Immigration Ordinance by the 1996 Ordinance, cannot retrospectively validate the Applicants' current detention if their detention had already become unlawful by the date of its enactment on 31st May 1996. I reject this argument. I agree that section 13D(1AA) cannot retrospectively validate any period of unlawful detention prior to 31st May 1996. But I do not see why, once section 13D(1AA) was enacted, detention which had previously been unlawful could not have been rendered lawful thereafter. That is not infringing the presumption against retrospectivity. Section 13D(1AA) is not, in those circumstances, being used to render lawful detention prior to its enactment. It is being used to render lawful detention after its enactment.

THE LEGALITY OF THE ORDERS FOR DETENTION

In *Chung Tu Quan*, an attempt was made to challenge the legality of the original orders for detention. The argument was based on the fact that section 13D(1) does not make detention mandatory. The use of the word "may" shows that detention is discretionary. Despite that, all asylum-seekers from Vietnam are detained as a matter of policy. The effect of that is that an asylum-seeker from Vietnam is never accorded an opportunity to make representations as to why he should not be detained. That was said to

---

[20] Emphasis added

be a breach of the rules of natural justice. I ruled that no breach of the rules of natural justice takes place in those circumstances, because the automatic making of orders for detention without considering the circumstances of each individual asylum-seeker from Vietnam was unnecessary since it would have served no useful purpose. The Court of Appeal upheld that part of my judgment, and a further appeal against that part of my judgment was not persisted in.

Ms. Li argued that the automatic making of orders for detention pending a detainee's removal from Hong Kong may be unlawful on a ground which was not advanced in *Chung Tu Quan*. When an order for a detainee's detention pending his removal from Hong Kong is to be made, regard should be had to all relevant circumstances. One of those circumstances was the existence of arrangements for the repatriation to Vietnam of asylum-seekers who were refused refugee status. The absence of such arrangements would have been a factor which the Director had to take into account. Since he made orders for detention in every case, it could be presumed that this was not a factor which he took into account.

I do not believe that this argument is open to the Applicants on the facts. Since March 1989, there have been arrangements for the repatriation to Vietnam of asylum-seekers who were refused refugee status. That was when the Voluntary Repatriation Scheme was put in place.[21] For reasons which I shall explain in a moment, I have considered the cases of only 12 of the Applicants. But I should be very surprised indeed if any of the 915 Applicants who were still in Hong Kong on 23rd January had had orders for their detention pending their removal from Hong Kong (as opposed to orders for their detention pending their screening) made prior to March 1989. I should add that even if a handful of the 915 Applicants had had orders for their detention pending their removal from Hong Kong made prior to March 1989, my view on the availability of the argument to them would be no different. Those orders would have been made at a time when it must have been plain that arrangements for their repatriation to Vietnam would be put in place in the near future.

THE CURRENT PROCEEDINGS

Originally, there were 1,379 detainees purporting to apply for writs of *habeas corpus* for their release. It was discovered that three of them had been included twice in the application. Accordingly, the number of detainees applying for their release was 1,376.

The application for their release first came before me on 13th November 1996. The application was made *ex parte*. I adjourned the application to 19th November so that notice of it could be given to the proposed Respondents. The Applicants' advisers had always accepted that it would not be possible to consider individually the cases of all the Applicants. Their suggestion was that the cases of a handful of the Applicants be heard and determined first. Those Applicants would be as representive as possible of any sub-

[21] Chung Tu Quan, p.576G

groups which might exist amongst them, because the aim was to enable the decisions in the cases of these Applicants to be as reliable a guide as was possible to the likely outcome of the cases of the other Applicants. In the event, 12 test Applicants were selected by the parties, and that was reflected in the order I made on 19th November. I directed that the hearing of the applications of those 12 Applicants should take place first, and I adjourned the hearing of the applications of the other Applicants *sine die*.[22]

Three of these 12 test Applicants have been repatriated to Vietnam since these proceedings were commenced.[23] Accordingly, I gave leave for the applications for writs of *habeas corpus* in their cases to be withdrawn. However, it has still been necessary for me to consider their cases. Since they were selected as test Applicants to represent particular sub-groups, a failure to deal with their cases would have denied to those sub-groups decisions which it was hoped would apply to them.

The proper respondent in an application for a writ of *habeas corpus* is the person on whom the proceedings are to be served. Ord.52 r.2(2) requires the proceedings to be served "on the person against whom the writ is sought or on such other persons as the judge may direct". I made no direction as to who the proceedings should be served on. Clearly, the writs are sought against the Superintendents of the various detention centres in which the Applicants are being held, and that makes the 2nd-6th Respondents proper Respondents in these proceedings. However, in *R.* v. *The Earl of Crewe ex p. Sekgome*.[24] it was said "that the writ may be addressed to any person who has such control over the imprisonment that he could order the release of the persons". I believe that to be a sound basis on which to proceed. Accordingly, the Director is a proper Respondent to these proceedings: since she makes the orders for detention in the first place by authorising the detention of the detainees, she has the power to order a detainee's release from detention if she chooses.

HARDIAL SINGH PRINCIPLE (i): PROSPECTS FOR REMOVAL

Principle (i) of the *Hardial Singh* principles limits the power of detention to such time as is reasonably necessary to effect the detainees' removal from Hong Kong. That focuses on what the prospects for the detainees' removal from Hong Kong really are. If there is no reasonable prospect of their removal from Hong Kong in the foreseeable future, the time which is reasonably necessary to effect their removal has expired and they are entitled to be released.

---

[22] The 12 test Applicants were: Chieng A Lac (A1), Nguyen Hai Lam (A4), Nguyen Thi Bich Huong (A15), Vu Van Phan (A55), Nguyen Van Thanh (A336), Vu Ngoc Tinh (A526), Chau Ngoc Kiu (A687), Phung Ngoc Thin (A867), Mai Thi Lan (A909), Ly Vi Vien (A954), Ly A Cuu (A1122) and Hoang Thi Kien (A1379). I trust that I will be forgiven for referring to them for convenience as A1-A1379

[23] A4, A687 and A1379

[24] [1910] 2 KB 576 at p.592

For this purpose, it is necessary to distinguish between those who have not been cleared by the Vietnamese authorities for return to Vietnam and those who have been cleared but who have not yet been returned. A detainee is treated as having been cleared if the Immigration Department has been informed through the UNHCR that the Vietnamese authorities have agreed to accept the detainee's return to Vietnam. However, it does not follow that a detainee who has not been cleared has been refused for return by the Vietnamese authorities. It may be that his particulars are still being processed. Nor does it follow that a detainee who had at one time been cleared, but whose clearance was subsequently withdrawn, has been refused for return by the Vietnamese authorities. It may be that the Vietnamese authorities decided that his clearance was premature, and they wished to make further inquiries before permitting him to be returned. That is not an infrequent occurrence. By the same token, it does not follow that a detainee who has been cleared, but whose return to Vietnam has not been effected, will necessarily be returned. It may be that a detainee is simply being kept waiting for a suitable flight. It may also be that the Vietnamese authorities are having second thoughts about his return. But it may also be that they have decided not to accept his return, but have failed to tell the Immigration Department that.

Accordingly, there are four categories of detainees still in Hong Kong:

(a) Those who have recently been cleared for return. Whether their detention is rendered unlawful by virtue of principle (i) of the *Hardial Singh* principles depends on how soon they can be put on a flight to Vietnam.

(b) Those who were cleared for return some time ago but are still awaiting their return. Whether their detention is rendered unlawful by virtue of principle (i) of the *Hardial Singh* principles depends on what the reason is for the delay in their return.

(c) Those who have not yet been cleared for return. Whether their detention is rendered unlawful by virtue of principle (i) of the *Hardial Singh* principles depends on what the reason is for their clearance being withheld, whether it is likely that they will eventually be cleared, and if so, when, and how soon thereafter they can be put on a flight to Vietnam.

(d) Those who have expressly been refused for return. Their detention would be unlawful because there is no reasonable prospect of their removal from Hong Kong in the foreseeable future. I assume the Respondents' case to be that no detainee in Hong Kong falls into this category because all those whose return has been expressly refused by the Vietnamese authorities have now been released from detention.

It will be necessary, of course, for me to determine these factual issues in relation to the cases of the individual test Applicants. But I should comment on the general evidence relating to those in category (a), and a particular problem with those in category (c). So far as category (a) is concerned, the number of flights and the size of the aircraft have meant that between December 1995 and April 1996 about 150 detainees a month could be returned under the Orderly Repatriation Programme. That increased to about

600 a month in May 1996, and to about 1,000 a month in October 1996. However, well over 11,000 detainees were cleared for return in the nine months from October 1995 to June 1996. I appreciate that this included those who were being returned under the Voluntary Repatriation Scheme. Despite that, the number of people capable of being returned did not, on the face of it, match the number of people being cleared for return. It was therefore likely that a backlog would be built up. This explains why there are so many people still in detention despite having been cleared for return, though I accept that it is unlikely to account for the non-return of anyone who was cleared for return prior to 1996.

So far as category (c) is concerned, there is one particular group of people who require to be considered separately. They are those who are not regarded by the Vietnamese authorities as being Vietnamese nationals. It is not disputed that the Government of Vietnam's policy is not to accept them for repatriation. The problem is in determining whether particular detainees who might be regarded as non-Vietnamese nationals by the Vietnamese authorities will in fact be accepted.

Broadly speaking, there are two difficulties. First, the Vietnamese authorities are reluctant to reveal what criteria they take into account in deciding whether a detainee is to be classified as a Vietnamese national. When Mr. Choy Ping Tai [25] has tried to found that out from Vietnamese immigration officials, he has failed to get a definitive answer. For what it is worth, he was told on one occasion that Vietnamese identity cards are only issued to Vietnamese nationals.[26]

Secondly, whatever the criteria are, there is some evidence that either those criteria or the policy itself is not being applied consistently. For example, an alien living in Vietnam is required to have a Foreign Resident's Permit which is renewable annually. Many of those detainees who were refused clearance by the Vietnamese authorities, or whose clearance has been withheld, on the basis that they were non-Vietnamese nationals, either hold such permits themselves, or are related to persons who hold such permits. The inference is that if a detainee or a member of his family holds such a permit, he will not be regarded by the Vietnamese authorities as a Vietnamese national. On the other hand, there are a large number of detainees who have been repatriated to Vietnam, despite the fact that they have asserted that they or members of their family have held alien documents (which I take to mean Foreign Resident's Permits). Indeed, of the 234 Applicants who have made that assertion, 127 have already been repatriated, and that includes 75 who claimed to have such permits themselves. Moreover, the three detainees whose release I ordered in *Chung Tu Quan*, on the basis that there was no reasonable prospect of them being returned to Vietnam because the issue to them of Foreign

[25] The Assistant Director of Immigration and Head of the Vietnamese Refugees Branch
[26] His informant was the Divisional Head of the Vietnamese Immigration Department

Resident's Permits meant that they were regarded as non-Vietnamese nationals, have all been cleared for return to Vietnam.[27]

There are three possible reasons why detainees who have, or whose relatives have, Foreign Resident's Permits might have been accepted for repatriation:

(i) the Vietnamese authorities were unaware of the true facts, and would not have permitted them to return had they known about the issue of such permits to them or their relatives;

(ii) even if the authorities were aware that particular detainees or their relatives had been issued with such permits, the issue of such a permit is not regarded as conclusive on the question of nationality;

(iii) even if the issue of such a permit is regarded as conclusive of non-Vietnamese nationality, the policy of not accepting non-Vietnamese nationals is not being applied consistently.

I do not think that reason (ii) is a realistic possibility. What does the issue of a Foreign Resident's Permit do if it does not legitimise the stay in Vietnam of someone who would otherwise not be permitted to reside in Vietnam, i.e. a foreign national? Accordingly, the reason why so many detainees who, or whose relatives, have been issued with Foreign Resident's Permits have been accepted for repatriation can only have been for reasons (i) or (iii).

In *Chung Tu Quan*, a check was made of 50 random files of persons who were Chinese by ethnic origin and who had been accepted for repatriation to Vietnam. Four of them were found to have Foreign Resident's Permits. In the circumstances, it was contended that any policy on the part of the Government of Vietnam to refuse the acceptance of persons who it regarded as non-Vietnamese nationals was not being consistently applied. I rejected that argument on the basis that it was possible that in those four cases the Vietnamese authorities could have been ignorant of the true facts.

I do not think that I can now be so dismissive about the suggestion of lack of consistency. The very large number of Applicants who have been repatriated despite they or their relatives having been issued with what they have asserted to be Foreign Resident's Permits strongly suggests that at least some of them must have been cleared for return despite the Vietnamese authorities knowing that such permits had been issued to them. The evidence before me, and I find, is that the Vietnamese authorities look at each detainee on a case-by-case basis. In those circumstances, the only conclusion that I

---

[27] The supreme irony is that having reserved judgment in this case on 27th January. I was later that day faced with an emergency application by two of them, including the eponymous Tan Te Lam, to grant them leave to apply for judicial review of the decisions refusing to accord them refugee status, and to restrain the Director from removing them from Hong Kong in the meantime: see *Phung Hoan v. The Director of Immigration* (HCMP 288/97)

can safely draw is that it is more likely than not that the policy of not accepting detainees who are non-Vietnamese nationals for repatriation is not being consistently applied. Accordingly, I simply cannot tell whether any of the 107 Applicants who have asserted that they or their relatives were issued with Foreign Resident's Permits and who were still in Hong Kong on 23rd January are likely to be cleared for return to Vietnam.

In these circumstances, the Respondents have satisfied me that there is a prospect of those detainees being cleared for return to Vietnam. In other words, until the Vietnamese authorities have expressly refused to accept them, there is a prospect of them being removed from Hong Kong at some time in the future. The question is when. There is, I think, no doubt that the pace at which the Vietnamese authorities are now processing the particulars has increased quite dramatically. Indeed, a Vietnamese interviewing team of senior officials came to Hong Kong at the beginning of December to interview those detainees for whom clearance had not yet been given, and another team arrived in January. These circumstances lead me to conclude that the Vietnamese authorities will soon be deciding whether to accept them back. Accordingly, there is every prospect of decisions being made in the near future as to whether they should be cleared for return to Vietnam, and there is, therefore, a prospect of them being cleared for return then. For that reason, but subject to the examination of the cases of the individual test Applicants, I have concluded that the time which is reasonably necessary to effect the removal from Hong Kong of this group of detainees has not yet expired.

HARDIAL SINGH PRINCIPLE (ii): LENGTH OF DETENTION

Principle (ii) of the ***Hardial Singh*** principles requires a detainee to be released from detention when his removal from Hong Kong cannot be achieved within a reasonable time. That focuses on whether the length of time in which he has been in detention has been unreasonable. This was the issue described by the Privy Council in ***Tan Te Lam*** as "the length of detention issue".

In *Chung Tu Quan*, I described the length of time which the Applicants in that case had been in detention as "truly shocking". I characterised it as being, at first blush, "an affront to the standards of the civilised society which Hong Kong aspires to be". However, in relation to the period of detention pending their screening, the length of their detention had to be seen in the context of the enormous pressures on the Immigration Department to screen the huge number of asylum-seekers who came to Hong Kong in 1988-1989. In relation to the period of detention pending their removal from Hong Kong, the fact that the Applicants had either never volunteered for repatriation or had reasonably been believed to have withdrawn their applications for voluntary repatriation could not be ignored. Accordingly, the speed with which they could be repatriated to Vietnam was, to all intents and purposes, out of Hong Kong's hands. Taking all these logistical constraints into account, as sections 13D(1A)(a) and 13D(1A)(b) required me to do, I was unable to conclude that their detention had been for an unreasonable time.

That finding was not addressed by the Court of Appeal in *Tan Te Lam*, because the Court of Appeal took the view that the ***Hardial Singh*** principles did not apply to the statutory regime under Part IIIA of the Immigration Ordinance. Nor was it addressed by

the Privy Council in *Tan Te Lam*, because the Privy Council decided that the Applicants' detention had become unlawful on other grounds. However, the Privy Council approved a major component of my thinking when it expressed the view that "the failure to apply for voluntary repatriation is a factor of fundamental importance in considering whether, in all the circumstances, the detention is reasonable".[28]

All but one of the test Applicants have been detained for many years.[29] Their periods of detention range from 74 to 103 months. But five of them have never applied for voluntary repatriation,[30] and another four only applied for voluntary repatriation in 1996.[31] One of them only applied in 1995,[32] and although the final test Applicant[33] applied for voluntary repatriation at least three times (the first time being in 1992), he either withdrew his application subsequently or is said to have refused to be transferred to the detention centre reserved for those who had volunteered for repatriation. The failure of these 11 Applicants to apply for voluntary repatriation at all or only after they had been in detention for many years has meant that in that respect their cases are not distinguishable from the Applicants in *Chung Tu Quan*.

For the reasons which I shall be giving when I come to principle (iii) of the *Hardial Singh* principles, and subject to the consideration of the individual cases of the test Applicants, I do not believe that the immigration authorities in Hong Kong have been responsible for the delay in repatriating detainees to Vietnam. It is unnecessary for me to repeat in this judgment the logistical constraints which caused me to reach the conclusion which I did in *Chung Tu Quan*. When you are dealing with such a massive influx of asylum-seekers, exceptional considerations apply. In these circumstances, it is sufficient to me to state that even though we are now two years on, I am unable to conclude, having regard amongst other things to the factors which sections 13D(1A)(a) and 13D(1A)(b) require me to take into account, that the detention of any of the test Applicants has been for an unreasonable time.

HARDIAL SINGH PRINCIPLE (iii): ALL REASONABLE STEPS

Principle (iii) of the *Hardial Singh* principles requires the Director to take all reasonable steps within her power to ensure that the detainees' removal from Hong Kong is achieved within a reasonable time. It is contended that in four respects the steps which have been taken to effect their removal have not been of the standard required. Reliance is placed on the absence of any scheme for non-volunteers prior to November 1991, the delay in sending particulars to Vietnam once the Orderly Repatriation Programme was established, the nature of the particulars which were sent, and the manner in which the particulars were sent. I will deal with each of these complaints in turn.

---

[28] Ibid., p.576G
[29] The exception is A1379, who did not arrive in Hong Kong until May 1995
[30] A15, A55, A526, A687 and A867
[31] A1, A4, A954 and A1122
[32] A909
[33] A336

(i) Prior to November 1991. It will be recalled that although the Voluntary Repatriation Scheme has existed since March 1989, the Orderly Repatriation Programme was put in place only in November 1991. It is contended that no steps were therefore taken prior to November 1991 to remove from Hong Kong those detainees who were unwilling to volunteer for repatriation. That is not correct. The unchallenged evidence before me is that a group of 51 asylum-seekers who had not volunteered for repatriation were unilaterally returned to Vietnam by the Government of Hong Kong in December 1989. A similar group of 23 asylum-seekers who had not volunteered for repatriation were returned to Vietnam under the auspices of the UNHCR in December 1990. Both these actions attracted international criticism. In those circumstances, there can be no valid criticism of the authorities in Hong Kong in deciding to wait until such time as a bilateral agreement with the Government of Vietnam for the return of non-volunteers was in place.

(ii) The date of the submission of the particulars. Although the Orderly Repatriation Programme was put in place in November 1991, it took a long time for the personal particulars of those who were to be returned under the Orderly Repatriation Programme to be sent to the Vietnamese authorities for them to process. For example, all of the six test Applicants whose particulars were sent to the Vietnamese authorities under the Orderly Repatriation Programme[34] had their particulars sent in 1993 and 1994, even though four of them[35] had been refused refugee status in 1989 and 1990. The Respondents say that this delay was unavoidable. I have no reason to doubt that. I referred in *Chung Tu Quan*[36] to the fact that the particulars of large numbers of detainees could not have been submitted at the same time for fear that the Vietnamese authorities (who have a staff constraint problem) would be swamped. For that reason, the submission of particulars had to be staggered.

It was contended on behalf of the Applicants that one would have expected the order in which the particulars were submitted to follow the same order in which the detention orders pending removal were made. An examination of the dates on which the particulars of some of the test Applicants were submitted shows that the particulars were not submitted in that order. As it is, there is no evidence before me as to the criteria which determined the order in which particulars were submitted. As in *Chung Tu Quan*, the Director has not been pressed to identify the Immigration Department's criteria. Had she been pressed to do so, I suspect that I would have required her to, even though the Respondents were reluctant to do so at the time of *Chung Tu Quan*. However, since the Director has not been pressed to do so, I am not prepared to assume that unfair criteria have been adopted or that the criteria which have been adopted have not been applied fairly or consistently.

I should add that this view is not affected by the little I know about the system of priorities agreed between the Governments of Vietnam and Hong Kong when the Orderly

---

[34] A4, A15, A55, A336, A526 and A867
[35] A4, A15, A55 and A336
[36] Ibid., p.578G

Repatriation Programme was agreed. That provided that "double backers" (i.e. those who had already been repatriated to Vietnam under the Voluntary Repatriation Scheme but had returned to Hong Kong) would be returned first, and that those who arrived after the Orderly Repatriation Programme was in place would be returned next. What I do not know is the order in which the particulars of non-double backers who arrived before November 1991 are submitted. All but one of the test Applicants[37] come into that category.

(iii) The nature of the particulars. Following the introduction of the simplified procedure in March 1995, the particulars of detainees have been submitted to the Vietnamese authorities in a form devised by the Vietnamese authorities. In that form, there is a specific box for recording the detainees' ethnic origin and nationality. The practice of the Immigration Department is simply to put down "Vietnamese" in that box. That practice is criticised by the Applicants. It could have caused delay in the processing of the particulars by the Vietnamese authorities.

I cannot go along with this criticism. When the form was devised, the Immigration Department suggested that this box be deleted. The source of a detainee's ethnic origin or nationality would have been the detainee himself, and the Immigration Department would have had no way of checking whether the claims of the detainee to a particular ethnic origin or nationality were true. I have no reason to doubt Mr. Choy's assertion that the Vietnamese authorities appreciated this difficulty, and indicated that it did not matter if this information was not obtained. In those circumstances, the Immigration Department has adopted the course of least resistance by simply putting down "Vietnamese" in the box. There is no evidence that this practice caused problems for the Vietnamese authorities. To the extent that their willingness to accept detainees was dependent on their ethnic origin or nationality, those were matters which the Vietnamese authorities were going to check for themselves.

In addition, it is said that on a number of occasions, the particular submitted to the Vietnamese authorities were wrong. To the extent that that caused the processing of their particulars to be delayed, that delay is attributable to the Immigration Department, provided that the Department knew or should have realised that the particulars were wrong. It is said that in many cases the Immigration Department should have realised that the particulars submitted to the Vietnamese authorities were wrong because they were contrary to what was recorded on the Immigration Department's own files. I shall have to deal with that criticism when I come to the cases of the individual test Applicants, though the criticism should be approached with some caution. After all, it does not necessarily follow that because the particulars submitted were wrong in a particular respect, therefore the processing of those particulars was delayed.

(iv) The submission of the particulars. The practice of the Immigration Department was to send the particulars of detainees in batches. Those batches varied enormously in size. Some related to only 30 or so detainees, while others included the particulars of up

[37] The exception is A1379

to 2,000 detainees. Moreover, in an attempt to assist the Vietnamese authorities, particulars of 2,280 detainees were submitted in November 1996. Those particulars had all been sent before. What was different was that they was sub-divided according to the area in which the detainees had lived. The criticism which is made is that by sending the particulars in batches, the particulars of some of the detainees were not sent until the particulars of all the detainees to be included in that batch had been obtained.

I am not impressed with this criticism. There is no evidence that the submission of the particulars in batches delayed the individual processing of the particulars. I say that because there is no evidence that there was a time when the Vietnamese authorities had finished processing the particulars which they had received and were awaiting the submission of further particulars. Provided that the staff who had been allocated to the task had a full workload in dealing with the processing of current particulars, the fact that the particulars of some detainees could have been sent earlier if the batches had been smaller is immaterial.

In conclusion, therefore, without looking at individual cases, I am satisfied that the Director has taken all reasonable steps within his power to ensure that the detainees' removal from Hong Kong is achieved within a reasonable time. That is not to say that all reasonable steps were taken in every individual case, and I shall have to return to the issue when I consider the cases of each of the test Applicants.

THE BILL OF RIGHTS

That, then, deals with whether the detention of the Applicants in general has become unlawful (or would have become unlawful had they not been repatriated to Vietnam) by reason of the ***Hardial Singh*** principles. I now turn to the contention that their detention has been, or has become, unlawful by reason of the Bill of Rights. The legality of the detention is attacked on three fronts: the conditions in which the Applicants are being detained, the length of time they have been in detention and its indefinite nature, and the reasons why the detention orders were made. The Articles in the Bill of Rights principally relied on are Arts.3,5(1) and 6(1). The material part of Art.3 reads:

> "No one shall be subjected to ... cruel, inhuman or degrading treatment."

The material part of Art.5(1) reads:

> "Everyone has the right to liberty ... of person. No one shall be subjected to arbitrary ... detention."

The material part of Art.6(1) reads:

> "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Arts.3 and 5(1) are relied on to challenge the legality of the detention on the basis of its length, its indefinite nature and the reasons why it was ordered. Arts.3 and 6(1) are relied on to challenge the legality of the detention on the basis of the conditions in which the Applicants are being detained.

Mr. Nicholas Bradley for the Respondents argued that the Bill of Rights has not been engaged in this case. That is because the Bill of Rights is said not to apply to persons who are detained pursuant to the powers conferred by section 13D(1). The source of that argument is section 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("the BORO") which provides:

> "As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation."

Mr. Bradley contended that section 11 applies because the Applicants did not have the right to enter and remain in Hong Kong, and that their detention amounted to the application of immigration legislation, namely the Immigration Ordinance, which governs their "stay in ... Hong Kong".

I reject that argument. I can see how section 13D(1) can in a general sense be said to relate to the length of their stay in Hong Kong and the conditions in which they are confined while they remain in Hong Kong. But the word "stay" has a special meaning in the context of immigration legislation. It is used in conjunction with the conditions with which an immigrant has to comply if he is permitted to remain in Hong Kong. Section 13A is a good example. It is headed: "Special conditions of stay regarding Vietnamese refugees". Having identified the circumstances in which refugees from Vietnam may be permitted to enter Hong Kong, it then identifies the conditions with which they must comply if they are permitted to remain in Hong Kong. The phrase "conditions of stay" includes matters such as the length of time in which the immigrant is permitted to remain in Hong Kong, or the place where he is to reside while he remains in Hong Kong, or any limitations on his activities while he remains in Hong Kong, such as working or studying. The phrase "conditions of stay", however, does not relate to detention pursuant to the power to detain. That is not a condition of stay with which the immigrant has to comply if he is permitted to remain in Hong Kong. Those persons to whom the power of detention relates are persons who by definition are not given the right to remain in Hong Kong. The power of detention is conferred so that they can be detained while a decision is being made as to whether they should be permitted to remain in Hong Kong as refugees, and if not, pending their removal from Hong Kong.

It follows that since the Applicants' detention does not amount to the application of legislation governing their "stay" in Hong Kong, section 11 does not exclude the operation of the Bill of Rights in their cases. In reaching this conclusion, I have not had to rely on the principle of statutory construction which requires provisions which limit fundamental rights and freedoms to be narrowly construed. The proper construction of

section 11 is, I believe, apparent without the need for resort to such an aid to interpretation.

THE ARBITRARY NATURE OF THE DETENTION

There are three features of the Applicants' detention which are said to render their detention arbitrary:

(i) The detention orders made under section 13D(1) were indefinite in the sense that at the time they were made, the Director did not know how long they would last. They would last for as long as it took for a decision to be made as to whether the detainees should be granted or refused refugee status, and if they were refused refugee status, for as long as it took to effect their removal from Hong Kong.

(ii) In the events which have occurred, the detention of the Applicants has lasted for a very long time.

(iii) Deterrence, security and public opinion were the reasons why the detention orders were made. Those were the reasons given in *Chung Tu Quan* for the policy of automatic detention under 13D(1), and those reasons have not changed since then. They have comprehensively and clearly been stated by Mr. Choy as follows:

"I would be failing in my duty to the government, the legislature and the residents of Hong Kong if I were to release illegal immigrants to live and work in Hong Kong thereby encouraging a further influx and causing public outcry. The objectives of the detention policy is resettlement or repatriation as appropriate in accordance with internationally agreed and accepted arrangements .... These objectives would be frustrated if persons who have been found not to be refugees are to be released to live and work in the community. We would in those circumstances have lost control de facto over immigration into Hong Kong from Vietnam. If the effectiveness of the detention policy is not preserved or is perceived as being not preserved, it would provide a magnet for an unlimited invasion from Vietnam. Furthermore, it would not be acceptable to the residents of Hong Kong and would cause security and public order problems. Hong Kong is already overcrowded with some of the densest areas of population in the world. It is already the focus for massive illegal immigration from China with whom the population here has close ties of family and kinship, a problem which is dealt with rigorously by detention and removal of illegal immigrants. Any departure from its pronounced detention policy in terms of illegal immigrants from Vietnam would be severely criticised and would lead to resentment and public outcry".[38]

[38] Para.39 of 1st affirmation of Choy Ping Tai

Does the cumulative effect of these factors render the detention of the Applicants arbitrary? Without the benefit of authority, my reaction would have been that the Applicants' detention was far from arbitrary. The word "arbitrary" suggests something whimsical or capricious, something for which one could not give a sensible reason if asked. The reasons for the policy of automatically detaining the Applicants are neither whimsical nor capricious. People may argue over whether the policy is really necessary or desirable, but the policy cannot be criticised on the basis that it does not make sense.

But suppose the word "arbitrary" has a meaning other than the one which I have attributed to it. Suppose that, in the context of the Applicants' detention, it means "unjustifiable". Even then, without the benefit of authority, I would have concluded that the Applicants' detention, albeit for periods which could not have been identified when the orders for their detention were made, and enormously prolonged though it has been, was justified for the reasons which Mr. Choy gives. His language is sufficiently clear to make it unnecessary for me to attempt an improvement of it.

There is one authority from overseas which I have found helpful. It comes from the United States. There, the courts have been faced with problems similar to those raised by asylum-seekers from Vietnam. In the early 1980s, the so-called Freedom Flotilla carried about 125,000 Mariel Cubans to Florida. Orders for their deportation to Cuba were made in respect of many of them. However, in a number of cases, their deportation could not be put into effect because Cuba refused to take them back, and no third country was prepared to accept them. In the meantime, they were kept in detention unless the Attorney-General exercised his discretion to grant immigration parole. His power to do so was exercisable only for "emergency reasons" and for reasons declared strictly in the public interest. In *Barrera - Echavarria* v. *Rison*,[39] it was argued that detention in these circumstances violated rules of international law which prohibited "prolonged arbitrary detention". The U.S. Court of Appeals rejected this argument. On the assumption that such a rule of international law existed, and on the further assumption that the domestic courts of the United States were bound by it, it was held that the rule was not violated. The detention was not arbitrary "because parole decisions are made according to specific criteria and reviewable by Courts".

In Hong Kong, the Director does not have an express power to grant immigration parole. She does not need it. That is because her power to make an order for detention under section 13D(1) is discretionary. She does not have to make such an order if she does not want to. However, since the exercise of that discretion always involves the making of orders for detention for reasons of policy, it is necessary to see whether there are any other checks and balances in our system to counter any abuse in the exercise of that discretionary power. There are. The *Hardial Singh* principles constitute the checks and balances recognised by our system of law to prevent abuse of the exercise of a statutory power of detention. Indeed, the *Hardial Singh* principles are far wider than the limited power to grant immigration parole conferred on the Attorney-General of the United States. The *Hardial Singh* principles represent a comprehensive and coherent code

[39] 44 F.3d 1441 (9th Cir.1995)

for ensuring that the detention of an asylum-seeker is not, and does not become, arbitrary. They also represent a sufficient and satisfactory regime for determining whether, by reason of its length and purpose, the detention of an asylum-seeker in Hong Kong amounts to cruel, inhuman and degrading treatment.

CAMP CONDITIONS

The Applicants' case is that the cumulative effect of the conditions in the detention centres in which they are detained, coupled with the uncertainty as to when they are going to be released, constitutes "cruel, inhuman or degrading treatment", and necessarily means that they are not being "treated with humanity and with respect for the inherent dignity of the human person". Keeping children in such conditions means that they are not accorded "the right to such measures of protection as are required by [their] status as a minor": Art. 20(1) of the Bill of Rights.

The initial question which arises is whether this argument can be mounted at all in *habeas corpus* proceedings. The traditional view is that *habeas corpus* cannot be used to attack the conditions of detention when someone is legally detained.[40] Mr. Philip Dykes, who argued this part of the case on behalf of the Applicants, pointed out that the majority of the reported cases in which the traditional view has been expressed deal with persons who are serving sentences of imprisonment, and determinate ones at that. He contended that the traditional view does not apply to those who are detained pursuant to administrative orders for their detention.

I am sceptical about the correctness of that argument. An application for a writ of habeas corpus seeks the release of the detainee from detention. It does not seek his release from a particular form of detention. On the face of it, therefore, habeas corpus is concerned with the fact of his detention, and not the conditions in which he is detained. The fact that the conditions in which the detainee is detained are unlawful does not make his detention unlawful. The remedies which a detainee has in those circumstances were summarised in *R.* v. *Deputy Governor of Parkhurst Prison ex p. Hague*.[41] They do not include his release from detention by *habeas corpus.*

However, it is open to the legislature to provide that the detention of a detainee may become unlawful by reference to the conditions in which he is detained. It is here that Mr. Dykes is, I believe, on stronger ground. That is because the legislature has provided for the conditions in which those who are detained under section 13D(1) to be taken into account in determining whether their detention is lawful. The opening words of section 13D(1A) are:

---

[40] See Sharp, "*The Law of Habeas Corpus*", 2nd. ed., pp. 151-155
[41] [1992] 1 AC 58 at p.166 E-F *per* Lord Ackner

> "The detention of a person under this section shall not be unlawful by reason of the period of the detention if that period is reasonable having regard to all the circumstances affecting that person's detention..."

The words "all the circumstances affecting that person's detention" are, in my view, wide enough to include the conditions in which he is detained. Accordingly, the conditions in which a detainee is detained can render his detention unlawful, but only to the extent that those conditions mean that the period of time in which he has been in detention has become unreasonable. The true question, therefore, is not whether the conditions in which the Applicants are detained is unlawful. The question is whether the nature of those conditions is such that it has rendered their detention unlawful having regard to the length of time that their detention has lasted.

It is said that in *Tan Te Lam* the Privy Council went further:

> "The court should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances."[42]

The argument is that the words "in unreasonable circumstances" brought in the conditions in which the detainees are detained. I disagree. This passage was in that part of the judgment headed "The *Hardial Singh* Principles". The reference to "unreasonable periods" was a reference to principle (ii) of the *Hardial Singh* principles. Accordingly, the reference to "unreasonable circumstances" was a reference to the other *Hardial Singh* principles. It was not a reference to circumstances outside those principles.

I should refer to one further argument. Mr. Dykes contended that there is an additional route by which detainees can rely on the conditions in which they are being detained to secure their release in habeas corpus proceedings. An order for detention can be challenged in *habeas corpus* proceedings on the ground of *Wednesbury* unreasonableness.[43] It is therefore said to be open to the Applicants to challenge in these proceedings the legality of the orders for detention made in their cases on the basis that it was *Wednesbury* unreasonable for the Director to make such orders if he knew the conditions in which the Applicants would be detained, and if those conditions constituted a violation of rights protected by the Bill of Rights. That argument would only be open to those Applicants who had orders for their detention made after 8th June 1992, which was when the BORO began to affect any acts authorised by the Immigration Ordinance.[44] However, from this argument, it is an easy step to say that it is open to the Applicants to challenge in these proceedings the legality of their continued detention on the basis that it

---

[42] Ibid., p.873F

[43] R. v. Governor of Brixton Prison ex p. Mehmet [1962] 2 QB 1 at p. 10, approved by the House of Lords in Armah v. Government of Ghana [1968] AC 192 at p.233

[44] Section 14(2) of, and the Schedule to, the BORO

is *Wednesbury* unreasonable for the Director not to authorise now the Applicants' release from detention on the footing that the conditions in which the Applicants are now detained infringe the Bill of Rights.

I have not reached any firm conclusions on this ingenious argument, which emerged during Mr. Dykes' reply and which Mr. Bradley did not therefore address. However, for present purposes, I shall assume, without deciding, that the argument is correct.

Against this background, I turn to consider the actual conditions in which the Applicants are being detained. On that topic, I have read at my own pace a large number of materials.[45] I described some of them in the ruling I delivered on 9th January. They include accounts of life in the detention centres, and the effect which the conditions have on detainees. I have also read the affirmations of those of the Applicants and of other detainees which address this issue. They speak of their own experiences, and the impact which the conditions have on their lives. They make poignant reading. At times, one cannot fail to be moved. The misery they feel at their plight comes through loud and clear. But it is important to remember that much of what causes that misery is the fact of their detention, rather than the conditions in which they are being detained. It is the consequences of the latter which I am addressing in this part of my judgment, not the former.

For the record, I should state that at the parties' invitation, I was shown round two of the detention centres, High Island Detention Centre and the section of Whitehead Detention Centre reserved for detainees who have applied for voluntary repatriation. In evaluating what I have read and observed, I have borne two things in mind:

(i) It would not have been right for me to assess the conditions in which the Applicants are detained by reference to western standards. I have to bear in mind the social, cultural and economic conditions in which the Applicants grew up. When it comes to the assessment of conditions for detainees, there are no absolute standards. Conditions which may be harsh for one group of people may not be harsh for others.

(ii) The physical conditions in the detention centres are obviously of primary importance but they do not tell the whole story. An assessment of the conditions involves taking into account, not merely the accommodation, the food and the sanitary arrangements, but also the facilities which are available - educational and recreational, medical and dental, counselling and policing.

Although there may be no absolute standards, there are certain internationally recognised minimum standards below which the conditions should not be allowed to fall. Those standards are the Standard Minimum Rules for the Treatment of Prisoners adopted

---

[45] Exhibited to the 1st affirmation of Robert Brook

by the United Nations in 1957. Some of those Rules relate to those detained in administrative detention rather than prisons. However, it is necessary to treat those Rules with caution. Although they purport to set out minimum standards, they aim to achieve much more. For example, Rule 14 provides:

> "All parts of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times".

That is a counsel of perfection. It is simply not possible for all parts of a large place of confinement to be kept scrupulously clean at all times. For example, the latrines at High Island Detention Centre were far from clean when I saw them. But the Rules are aspirational, and have to be applied in the light of local conditions.[46] That means that the Rules have to be interpreted and applied with an eye on the practical realities. In any event, an infringement of some of the Rules does not automatically mean that the conditions as a whole constitute "cruel, inhuman or degrading treatment".

Mr. Dykes spent some time demonstrating the different regimes which govern prisoners,[47] illegal immigrants[48] and asylum-seekers from Vietnam detained under section 13D(1).[49] Mr. Dykes' purpose was to show that in some respects the regime for asylum-seekers from Vietnam is harsher than the regimes for prisoners and illegal immigrants. The idea behind that was to show that one of the reasons for the policy of detaining asylum-seekers from Vietnam was to deter other would-be asylum-seekers from coming to Hong Kong. As I have said, that is not disputed, but as I have also said, that does not advance the Applicants' case.

Bearing everything that I have read and observed in mind, I have reached the conclusion that the conditions in which the Applicants are detained are not such as have rendered their detention unlawful having regard to the length of time that their detention has lasted. Nor do I think that the conditions infringe any of the provisions in the Bill of Rights on which the Applicants rely. It follows that the conditions in which the Applicants are detained did not make it ***Wednesbury*** unreasonable for the Director to make orders for their detention, nor did they make it ***Wednesbury*** unreasonable for the Director not to authorise their release from detention.

THE TEST APPLICANTS

With all of these considerations in mind, I turn to the individual cases of the 12 test Applicants.

---

[46] See Feldman, *"Civil Liberties and Human Rights in England and Wales"*, pp.269-270

[47] The Prison Rules

[48] Illegal immigrants are subject either to the Prison Rules or to rules under the Immigration (Treatment of Detainees) Order

[49] Such detainees are subject to the Immigration (Vietnamese Migrants) (Detention Centre) Rules

(1) Chieng A Lac (A1)

Chieng A Lac was born in 1958. He married in 1978, and had three children. His wife and children came to Hong Kong in December 1990, and he joined them in February 1991. An order for his detention was made under section 13D(1) pending a decision to grant or refuse him refugee status. In December 1993, he was refused refugee status, and a further order for his detention was made under section 13D(1) pending his removal from Hong Kong. In June 1994, the Refugee Status Review Board confirmed the decision to refuse him refugee status, and made a further order for his detention under section 13D(1) pending his removal from Hong Kong.

A1 did not initially apply for voluntary repatriation to Vietnam. Accordingly, his repatriation to Vietnam could only be effected under the Orderly Repatriation Programme. By March 1995, when the simplified procedure was introduced, his particulars had not been submitted to the Vietnamese authorities for processing, even though the Refugee Status Review Board had confirmed the decision to refuse him refugee status nine months earlier. I assume that that was because the time for submitting his particulars to the Vietnamese authorities had not been reached according to the criteria which determined the order in which particulars were submitted.

In May 1995, his particulars were submitted to the Vietnamese authorities under the simplified procedure. The details of a total of 1,052 detainees were included in this batch. Curiously, his ethnic origin was stated to be Chinese on the appropriate form, contrary to the general practice. Be that as it may, in December 1995, the UNHCR informed the Immigration Department that A1 had been cleared for return to Vietnam. However, in June 1996, further information was required by the Vietnamese authorities, and that was supplied in August 1996 in a batch which included the particulars of about 350 detainees. His particulars were also included in the batch divided up geographically which was submitted in November 1996.

In the meantime, A1 had in June 1996 applied for voluntary repatriation. In September, he was interviewed by the Vietnamese delegation in Hong Kong which interviews all applicants for voluntary repatriation. He was also interviewed in December by the visiting Vietnamese delegation.

It is not possible to tell why the clearance of A1 in December 1995 has not been put into effect. It is just possible that it had something to do with the fact that his ethnic origin was originally given as Chinese, but I regard that as highly unlikely. There is no suggestion in his case that the particulars submitted contained errors. The only clue as to what might be the reason for the fact that he has not yet been returned is what he claims he was told at both the interviews. The interviewing team on both occasions knew where he had been living in Vietnam. They told him that he would not be able to return there as someone else was now living there. At the first of the two interviews, he was told that he would have to provide another address to which he could go. He claims that he does not have another address to go to. His affirmation does not say whether he told the interviewing team that, but I assume that he did.

I have not found A1's case easy, but the fact remains that, for one reason or another, the interviewing teams regard the fact that he has nowhere to return to as a real problem. I cannot gauge how serious that problem is. Not without hesitation, I have concluded that it has not been established that there is a reasonable prospect of his return to Vietnam in the foreseeable future. I therefore declare that his continued detention under section 13D(1) is unlawful. I order his immediate release.

I should add one thing. I have said that A1 was interviewed by the Vietnamese delegation which came to Hong Kong in December. While they were here, they interviewed 304 detainees. That included eight of the test Applicants. As for the four test Applicants who were not interviewed, two had already being repatriated,[50] one had already been cleared for return,[51] and one was due to be interviewed by the visiting delegation which came to Hong Kong in January.[52] I doubt whether it is just coincidence that of the 3,000 or so detainees still not cleared, the 10% who were interviewed included all but one of the test Applicants. I strongly suspect, therefore, that the test Applicants have been selected for interview so that it could be said that decisions as to whether they would be cleared for return to Vietnam were going to be made soon if they had not been made already. If that is so, it does a disservice to the attempt to make them representative of any subgroups to which they belong. However, I have to deal with the Applicants' cases as I find them, and the fact that all but one of those of the test Applicants who needed to be interviewed have been interviewed is an important factor in their individual cases.

(2) Nguyen Hai Lam (A4)

Nguyen Hai Lam was born in 1966. He married in 1988, and came to Hong Kong with his wife in June 1988. An order for his detention was made under section 13D(1) pending a decision to grant or refuse him refugee status. In June 1989, he was refused refugee status, and a further order for his detention was made under section 13D(1) pending his removal from Hong Kong. In August 1989, the Refugee Status Review Board confirmed the decision to refuse him refugee status, and made a further order for his detention under section 13D(1) pending his removal from Hong Kong. In September 1989, his wife gave birth to a daughter.

A4 did not initially apply for voluntary repatriation to Vietnam. Accordingly, his repatriation to Vietnam could only be effected under the Orderly Repatriation Programme. In April 1994, his particulars were submitted to the Vietnamese authorities to be processed in a batch containing the particulars of 255 detainees. In May 1995, the Vietnamese authorities requested further information about A4. That information was supplied in September 1995. His particulars were also included in the batch divided up geographically which was submitted in November 1996.

---

[50] A687 and A1379
[51] A526
[52] A867

In the meantime, A4 had in April 1996 applied for voluntary repatriation. In August, he was interviewed by the Vietnamese delegation in Hong Kong which interviews all applicants for voluntary repatriation. He was also interviewed in December by the visiting Vietnamese delegation. Following that interview, he was cleared for return, and on 17th January he and his family were repatriated to Vietnam.

There is no suggestion in A4's case that the particulars submitted contained errors. Indeed, the reason why A4 was not cleared earlier was not the fault of the Immigration Department. A4's address which was given in the particulars submitted in April 1994 was the address which A4 had given on his arrival in Hong Kong. It was the address at which he had lived with his parents before he joined the Vietnamese army in 1981. He claims that his parents still live there. He claims, though, that he was told at his interview in August that his address could not be verified. It looks, therefore, as if the delay in clearance was due to the failure of the Vietnamese authorities to make sufficient inquiries about him at the address which they had been given. Had he not been recently repatriated to Vietnam, I would have been satisfied that there was a reasonable prospect of him being cleared for return in the near future (because the interview would have resulted in the speedy verification of his address), and that the time which was reasonably necessary to effect his removal from Hong Kong had not expired.

(3) Nguyen Thi Bich Huong (A15)

Nguyen Thi Bich Huong was born in 1963. She came to Hong Kong with her husband in July 1988. An order for her detention was made under section 13D(1) pending a decision to grant or refuse her refugee status. In April 1989, she was refused refugee status, and a further order for her detention was made under section 13D(1) pending her removal from Hong Kong. In August 1989, the Refugee Status Review Board confirmed the decision to refuse her refugee status, and made a further order for her detention under section 13D(1) pending her removal from Hong Kong. While in Hong Kong, she gave birth to two daughters.

A15 did not apply for voluntary repatriation to Vietnam. However, her husband did. He was repatriated to Vietnam under the Voluntary Repatriation Scheme in December 1994 with their elder daughter. A15 remained in Hong Kong. She has formed a relationship with another asylum-seeker from Vietnam, and she gave birth to their daughter in April 1995.

Since she did not apply for voluntary repatriation, her repatriation to Vietnam could only be effected under the Orderly Repatriation Programme. In June 1994, her particulars were submitted to the Vietnamese authorities to be processed in a batch containing the particulars of 509 detainees. In January 1996, the Vietnamese authorities requested further information about her. That information was supplied in April 1996. Her particulars were also included in the batch divided up geographically which was submitted in November 1996. She was interviewed in December by the visiting Vietnamese delegation. She has not yet been cleared for return, and a response is awaited from the Vietnamese authorities.

The reason why she has not yet been cleared for return is, I believe, relatively clear. When she arrived in Hong Kong, she gave as her address the address at which she had lived with her husband. However, she had only lived there for a few months. She did not have Ho Khau (the Vietnamese form of household registration) for that address. Nor did she have Ho Khau for the address where she had been living with her cousin for the previous eight years. The address for which she had Ho Khau was the address at which she had been living with her family prior to 1980. However, the address which had been included in the particulars submitted in June 1994 had been the address she had given when she arrived in Hong Kong. The immigration authorities cannot be blamed for submitting that address to the Vietnamese authorities. The address required to be included in the form agreed with the Government of Vietnam in which the particulars of detainees to be returned under the Orderly Repatriation Programme are submitted is "Place of residence in Vietnam before departure".

There are two circumstances in which the Immigration Department might have discovered that A15 did not have Ho Khau at the address which had originally been submitted. First, the Department would have discovered that if she had been interviewed before the particulars were submitted. However, I do not suppose that that was the practice in view of the enormous number of people the Department was dealing with, and I cannot blame the Department for that. Secondly, the Department might have discovered that she did not have Ho Khau at the address which had been given if immigration officers had read the screening documents in her case. I do not know whether the screening documents would have revealed that, but even if they had I do not criticise the Department for not checking the screening documents. The size of the problem that the Department had to cope with made such an exercise impracticable.

Accordingly, I infer that the reason why the Vietnamese authorities requested further information about A15 in January 1996 was because they could not verify the address which had been given to them as her address. As it turned out, the further information which was given in April 1996 did not improve matters. If anything, they made things worse. This time, two addresses were given. One of those addresses was that of her new partner. No doubt, that address was given because by then her relationship with him was known. But that would only have compounded the problem, because that was an address for which not only did she not have Ho Khau, but it was also not an address at which she had ever lived. The other address which was given was the address which had been given in June 1994, presumably because that was still the most obvious address for the Immigration Department to give.

It is here that I think the Immigration Department was at fault. A15's evidence is that she was interviewed by officers from the Immigration Department at the beginning of 1996. I see no reason to doubt that. It is what I would have expected in view of the recent request from the Vietnamese authorities for information. She claims that she was shown what she now knows to be the address in Vietnam of her partner. She said that she did not recognise the address and had never lived there. That evidence is not contradicted, and again I see no reason to doubt it. In the light of that information, that address should not have been sent to the Vietnamese authorities in April 1996. What A15 should have

been asked at the interview was why the Vietnamese authorities had not been able to verify the address she had given on arrival in Hong Kong. If she had been asked that, she would no doubt have said that she did not have Ho Khau for it, and that would have enabled more accurate and useful particulars to be sent in April 1996 than those which were sent.

There is one other problem. In the particulars sent in November 1996, two addresses for A15 were given. One was the address which she had given on arrival in Hong Kong. The other was a shorter version of it. A15 gives a plausible account of how that is likely to have come about. She claims that when she was interviewed in January 1996 she was asked to write down her last address in Vietnam. Since she had only been there for a few months 7 1/2 years previously, she could only remember part of the address. The part of the address she wrote down is the other address given in the November 1996 particulars. I rather doubt whether the Vietnamese authorities would have been confused by it, but it is an indication of the slapdash way in which the submission of her particulars was handled.

I believe that A15 will be cleared for return to Vietnam in the near future now that she has been interviewed by the Vietnamese delegation, because I must assume that they managed to elicit the relevant facts from her. But I have reached the conclusion that if the relevant facts had been elicited from her in January 1996 when she was interviewed by officers from the Immigration Department, particulars sufficient to enable her to be cleared relatively quickly would have been submitted in April 1996. I think that she would have been cleared for return to Vietnam by now. In those circumstances, the Director has not satisfied me that all reasonable steps have been taken to ensure that her removal from Hong Kong would be achieved within a reasonable time. I declare that her continued detention under section 13D(1) is unlawful for that reason. I order her immediate release.

I should add that I am not unaware of the irony in her case. She has never applied for voluntary repatriation. She has therefore never done anything herself to make her repatriation any easier. And yet she is being released because of the steps which the immigration authorities failed to take which would, more likely than not, have secured her repatriation by now. But I remind myself that those who do not contribute to securing their release are still entitled to be treated according to law. The fact that her refusal to apply for voluntary repatriation made it difficult for principle (ii) of the ***Hardial Singh*** principles to secure her release has nothing to do with whether principle (iii) of the ***Hardial Singh*** principles justifies her release.

(4) Vu Van Phan (A55)

Vu Van Phan was born in 1957. He has a wife and two children in Vietnam. He came to Hong Kong without them in August 1988. An order for his detention was made under section 13D(1) pending a decision to grant or refuse him refugee status. In June 1990, he was refused refugee status, and a further order for his detention was made under section 13D(1) pending his removal from Hong Kong. In August 1990, the Refugee

Status Review Board confirmed the decision to refuse him refugee status, and made a further order for his detention under section 13D(1) pending his removal from Hong Kong.

A55 did not apply for voluntary repatriation to Vietnam. Accordingly, his repatriation to Vietnam could only be effected under the Orderly Repatriation Programme. In August 1994, his particulars were submitted to the Vietnamese authorities to be processed in a batch containing the particulars of 397 detainees. In February 1996, the Immigration Department was informed that A55 had been cleared for return to Vietnam. However, in August 1996, further information was required by the Vietnamese authorities, and that was supplied in September 1996 in a batch which included the particulars of 79 detainees. His particulars were also included in the batch divided up geographically which was submitted in November 1996. He was interviewed in December by the visiting Vietnamese delegation, and his clearance has since been confirmed. There is every prospect of him being repatriated to Vietnam in the near future, and the time which is reasonably necessary to effect his removal from Hong Kong has not expired.

The reason why there was a delay in the confirmation of his clearance is, I think, again relatively clear. It related to his address in Vietnam. His last address in Vietnam which was given to the Vietnamese authorities in August 1994 was Xa Minh Tan, Kim Mon, Hai Doung, North Vietnam. That was the address which A55 claims he gave to the immigration authorities on his arrival, and it is the address which he admits was where he had been living with his family in the three months before he came to Hong Kong. Accordingly, on his case, the Immigration Department gave the Vietnamese authorities the correct information as to his place of residence in Vietnam before departure. The irony is that the form compiled on his arrival by the immigration officer who interviewed him recorded his address in Vietnam as Mo Cao Lanh, Tu Lac Minh, Tan Kim Mon, Haiphong, North Vietnam. He claims that this was the mine at which he had been working for 11 years until three months prior to his departure from Vietnam, and that it was the address for which he had Ho Khau. He claims that he did not give this address to the immigration authorities on his arrival in Hong Kong. It was the address on his work permit, and it was simply recorded as his address. Even then, it was wrongly recorded. The mine was in the Province of Hai Hung, not the City of Haiphong. I have no reason to doubt any of that.

How, then, did the Immigration Department come to send the correct address to the Vietnamese authorities? The answer is that when he was subsequently interviewed in connection with his claim for refugee status, the record of that interview records his address as being Xa Minh Tan. The upshot of all this is that, whether or not the correct address was recorded on his arrival, it was his correct address which was submitted to the Vietnamese authorities when his particulars were initially sent in August 1994.

I infer from these facts that the reason why the Vietnamese authorities requested further information about him in August 1996 was because they could not verify the address which they had been given. Accordingly, when the further information was

supplied in September 1996, the information gave Xa Minh Tan as his address, but gave a new address as well, namely Mo Cao Lanh. That would have been fine but for the fact that in giving that address it was said to be in the City of Haiphong rather than in the Province of Hai Hung.

Did this error delay the confirmation of his clearance? I think it very unlikely. The wrong information was supplied in September 1996, and I doubt if his clearance would have been confirmed by the time it was in fact confirmed even if the error had not occurred. In those circumstances, the error does not make his continued detention unlawful.

(5) Nguyen Van Thanh (A336)

Nguyen Van Thanh was born in 1966. He came to Hong Kong in May 1989. An order for his detention was made under section 13D(1) pending a decision to grant or refuse him refugee status. In January 1990, he was refused refugee status, and a further order for his detention was made under section 13D(1) pending his removal from Hong Kong. In March 1990, the Refugee Status Review Board confirmed the decision to refuse him refugee status, and made a further order for his detention under section 13D(1) pending his removal from Hong Kong.

A336 applied for voluntary repatriation to Vietnam in February 1992. He withdrew his application later that month. He applied again for voluntary repatriation in January 1993. Later that month, he withdrew that application. The last time he applied for voluntary repatriation was in November 1995. All of that is common ground. What is not is what follows. According to Mr. Choy, A336 refused to be transferred to a detention centre reserved for those who volunteer for repatriation. Since one of the reasons for the transfer of those who apply for voluntary repatriation is to make it easier for them to be interviewed by the Vietnamese delegation in Hong Kong, his application for voluntary repatriation was not processed by the UNHCR. For his part, A336 maintains that he never refused to be transferred, and he therefore cannot understand why his application for voluntary repatriation was not processed.

There is no material upon which I can make a definitive finding on this issue. I am sceptical about A336's claim, because if he had volunteered for repatriation, there is no reason why he should not have been transferred. On the other hand, Mr. Choy's evidence on the issue is hearsay, and he does not identify the source of his information. I therefore propose to proceed on the basis that what A336 claims is true.

Because his application for voluntary repatriation was not processed, his repatriation to Vietnam could only be effected under the Orderly Repatriation Programme. In November 1993, his particulars were submitted to the Vietnamese authorities to be processed in a batch containing the particulars of 530 detainees. In May 1994, further information was required by the Vietnamese authorities, and that was supplied in June 1994. That information was submitted again in February 1995 in a batch which included the particulars of 121 detainees. In December 1995, the information was submitted yet

again in a batch which included the particulars of 280 detainees. Mr. Choy's evidence was that this batch of particulars was submitted "for priority clearance", but he does not give any explanation as to why or what that means. Finally, A336's particulars were included in the batch divided up geographically which was submitted in November 1996. He was interviewed in December by the visiting Vietnamese delegation. He has not yet been cleared for return, and a response is awaited from the Vietnamese authorities.

The reason why A336 has not yet been cleared for return is again, I think, relatively clear. Again, it relates to his address in Vietnam. The form which was completed on his arrival by an immigration officer recorded him as having an address in Hai Hung Province. That was his family's address, though it was an address which he had left many years before. He claims that he gave two other addresses as well: the address of his foster father in Ho Chi Minh City, and an address in Quang Ninh Province where his foster parents had lived at some time in the past. He did not have Ho Khau anywhere in Vietnam. A336 does not say whether he gave immigration officers these addresses on arrival or whether they were given by him later at the screening interview. Again, although he told immigration officers that he had not lived at any of these addresses for some time, and that for the previous few years he had not had a fixed address, he does not say whether that information was given on his arrival or only at his screening interview. In these circumstances, I am not prepared to assume that there was any fault on the part of the immigration officer on A336's arrival in Hong Kong in recording the address in Hai Hung Province as A336's address.

This was the address which was sent to the Vietnamese authorities in November 1993. For the reasons I gave when dealing with A15's case, I cannot criticise the Immigration Department for that. However, I infer that the reason why the Vietnamese authorities requested further information about A336 in May 1994 was because they could not verify the address which had been given to them as his address.

The further information supplied in June 1994 gave an additional address for A336. It was the address in Quang Ninh Province. According to Mr. Choy, this information was given "after verification by [the Immigration] Department". Since A336 claims that he was not interviewed until after the information was sent out (and since his evidence is unchallenged, I propose to proceed on the basis that it is true), the verification can only have consisted of an examination of his file which would have shown what he had said at the screening interview. I have no reason to doubt his claim that he said at the screening interview that the address in Quang Ninh Province was where his foster parents had lived at some time in the past, and that he had never lived there. In those circumstances, it was pointless to send that address to Vietnam. It could only have served to confuse the issue.

A336 claims that he was interviewed by officers from the Immigration Department towards the end of 1994 and twice in 1995. He claims that he repeated at those interviews what he had said earlier about the addresses. His evidence is again unchallenged, and I therefore proceed on the basis that it is true. Despite that, there is no evidence whatever that any attempts were made by the Immigration Department to explain A336's position to the Vietnamese authorities. I am left to assume that the continued resubmission of

particulars repeated the same information which was hardly going to help A336 at all. Indeed, when I look at the information supplied in November 1996, what purports to be two addresses are given. However, they are both the same: his family's address in Hai Hung Province. That information at least does not include the valueless address in Quang Ninh Province, but the fact that two identical addresses are given is an indication of the slapdash way in which his particulars had been submitted.

I note that A336 claims that at the December interview he was told that the Vietnamese authorities were unlikely to accept him back, and that he got the impression that that was because there was nowhere for him to go. The problem over his addresses gives that some credibility. For the same reasons as in A1's case, therefore, it has not been established to my satisfaction that there is a reasonable prospect of A336's return to Vietnam in the foreseeable future. In addition, I have reached the conclusion that if the relevant facts had been correctly related to the Vietnamese authorities at the time they sought further information, the issue as to whether he should be cleared for return would have been addressed considerably sooner. In those circumstances, the Director has not satisfied me that all reasonable steps have been taken to ensure that his removal from Hong Kong would be achieved within a reasonable time. I therefore declare that his continued detention under section 13D(1) is unlawful for that reason. I order his immediate release.

(6) Vu Ngoc Tinh (A526)

Vu Ngoc Tinh was born in 1967. He came to Hong Kong in June 1989. An order for his detention was made under section 13D(1) pending a decision to grant or refuse him refugee status. In June 1992, he was refused refugee status, and a further order for his detention was made under section 13D(1) pending his removal from Hong Kong. In January 1993, the Refugee Status Review Board confirmed the decision to refuse him refugee status, and made a further order for his detention under section 13D(1) pending his removal from Hong Kong.

A526 did not apply for voluntary repatriation to Vietnam. Accordingly, his repatriation to Vietnam could only be effected under the Orderly Repatriation Programme. In August 1994, his particulars were submitted to the Vietnamese authorities to be processed in a batch containing the particulars of 457 detainees. There is no suggestion that those particulars contained errors. He was cleared for return to Vietnam in October 1996, but that came too late to prevent his particulars being included in the batch divided up geographically which was submitted in November 1996.

There is no indication as to what it was that held up his clearance for so long. But for one matter, there would have been every prospect of him being repatriated to Vietnam in the near future. What will prevent his repatriation going ahead is that he has been granted legal aid to apply for leave to apply for judicial review of the decisions by which he was refused refugee status. The evidence is that his case is in fact to be reconsidered by the Refugee Status Review Board. I therefore assume that his proposed challenge to the earlier decisions for which he had been granted legal aid has been withdrawn on the

basis that he is to be re-screened instead. On that basis, the Director has agreed that he should not be repatriated in the meantime. In those circumstances, he is no longer being detained pending his removal from Hong Kong. He is being detained pending a decision to grant or refuse him refugee status. For the time being, therefore, his detention is not unlawful.

(7) Chau Ngoc Kiu (A687)

Chau Ngoc Kiu was born in 1966. She came to Hong Kong with her husband in August 1989. An order for her detention was made under section 13D(1) pending a decision to grant or refuse her refugee status. In February 1993, she was refused refugee status, and a further order for her detention was made under section 13D(1) pending her removal from Hong Kong. In October 1993, the Refugee Status Review Board confirmed the decision to refuse her refugee status, and made a further order for her detention under section 13D(1) pending her removal from Hong Kong. Since arriving in Hong Kong, she has given birth to three children.

A687 did not apply for voluntary repatriation to Vietnam. Accordingly, her repatriation to Vietnam could only be effected under the Orderly Repatriation Programme. By March 1995, when the simplified procedure was introduced, her particulars had not been submitted to the Vietnamese authorities for processing, even though the Refugee Status Review Board had confirmed the decision to refuse her refugee status 17 months earlier. I assume that that was because the time for submitting her particulars to the Vietnamese authorities had not been reached according to the criteria which determined the order in which the particulars were submitted. In July 1995, her particulars were submitted to the Vietnamese authorities under the simplified procedure. The particulars of 1,042 detainees were included in this batch. There is no suggestion that these particulars contained errors. She was cleared for return to Vietnam in October 1996, and she was repatriated with her family to Vietnam in November 1996.

A687's repatriation to Vietnam has meant that she has not made a substantive affirmation in these proceedings, but her brother, Chau Cun Bau, has. He claims that their father is a Taiwanese national, that the family was forced to register as aliens, and that the family was not granted Ho Khau. Their Taiwanese background is supported by two documents. Unfortunately, neither of them have been exhibited, but Mr. Choy accepts that copies of them were submitted by A687's solicitors to the Immigration Department in the wake of the Privy Council's decision in *Tan Te Lam* in order to support the assertion that A687's Taiwanese nationality meant that the Vietnamese authorities would not accept her return. Those documents were:

(i) a Taiwanese passport in the name of the man who she claims to be her father, though I assume that the passport was of the type which did not confer a right on its bearer to enter Taiwan; and

(ii) a Foreign Resident's Permit in the name of the man she claims to be her father.

I know that a copy of the latter was sent to the Vietnamese authorities. That is because the solicitors for a large number of asylum-seekers sent the Immigration Department copies of the Foreign Resident's Permits relating to 240 detainees. One of those was A687's father. A copy of that was sent to the Vietnamese authorities. However, that was in connection with Chau Cun Bau's claim that he was not a Vietnamese national, and I do not know whether the Vietnamese authorities were ever told that Chau Cun Bau was A687's brother.

This recitation of the facts of A687's case shows that no conclusions can be drawn from her case about the way in which the Vietnamese authorities treat detainees who are related to persons holding Foreign Resident's Permits. I simply do not know what the Vietnamese authorities were told about her Taiwanese connections, or whether they realised that she was the daughter of someone who had a Foreign Resident's Permit. The form which contained her particulars did not mention either of these things. I note that Chau Cun Bau and another sister have both been released from detention - on the basis, presumably, that the Vietnamese authorities expressly refused to accept them. However, in Chau Cun Bau's case, the Vietnamese authorities knew that his father had a Foreign Resident's Permit, and I imagine that the Vietnamese authorities discovered somehow that his other sister had as well.

On these facts, had A687 not already been repatriated to Vietnam, I would have been satisfied that there was a prospect of her being cleared for return in the near future, and that the time which was reasonably necessary to effect her removal from Hong Kong had not expired.

(8) Phung Ngoc Thin (A867)

Phung Ngoc Thin was born in 1959. He came to Hong Kong with his wife and two sons in April 1990. An order for his detention was made under section 13D(1) pending a decision to grant or refuse him refugee status. In March 1993, he was refused refugee status, and a further order for his detention was made under section 13D(1) pending his removal from Hong Kong. In November 1993, the Refugee Status Review Board confirmed the decision to refuse him refugee status, and made a further order for his detention under section 13D(1) pending his removal from Hong Kong.

A867 did not apply for voluntary repatriation to Vietnam. Accordingly, his repatriation to Vietnam could only be effected under the Orderly Repatriation Programme. In December 1994, his particulars were submitted to the Vietnamese authorities to be processed in a batch containing the particulars of 602 detainees. There is no suggestion that those particulars contained any errors. In January 1996, the Immigration Department was informed that A867 had been cleared for return to Vietnam. He was due to be repatriated to Vietnam on 28th October 1996. However, on 25th October, the Vietnamese authorities decided not to accept him for the time being pending a further check of his address. To all intents and purposes, his clearance was temporarily withdrawn. He is due to be interviewed by the visiting Vietnamese delegation which arrived in Hong Kong in

January. He has not yet been cleared for return, and a response is awaited from the Vietnamese authorities.

The reason why A867 has not been cleared for return to Vietnam may be because the Vietnamese authorities do not regard him as a Vietnamese national. Although he was issued with a Vietnamese identity card, and although his nationality was given as Vietnamese on his children's birth certificates, he was issued with a Foreign Resident's Permit in May 1993 which recorded his nationality as being Taiwanese. Since he had already been in Hong Kong for three years by then, it may be that that permit was obtained in order to support his claim that the Vietnamese authorities would not accept him for repatriation. Having said that, though, his parents were issued with Taiwanese registration certificates in 1956. I do not know what the status of such certificates is.

Copies of his parents' registration certificates were produced by A867 during his screening interview in 1993, and a copy of his Foreign Resident's Permit was provided by his solicitors to the Immigration Department in September 1996. I do not know whether copies of them were sent to the Vietnamese authorities, but if they were, that could explain why he has not yet been cleared. Indeed, even if they were not, it is possible that the Vietnamese authorities discovered the issue of these documents when they were processing the particulars submitted in December 1994.

I cannot tell what the visiting Vietnamese delegation will recommend when they interview him. But a large number of detainees to whom similar documents had been issued have been cleared for return, and in some of those cases the Vietnamese authorities must have known about the issue of those documents. There is every prospect of a decision being made in his case soon, and therefore a prospect of him being cleared for return then. Accordingly, the time which is reasonably necessary to effect his removal from Hong Kong has not expired.

(9) Mai Thi Lan (A909)

Mai Thi Lan was born in 1962. She came to Hong Kong in May 1990. An order for her detention was made under section 13D(1) pending a decision to grant or refuse her refugee status. In April 1993, she was refused refugee status, and a further order for her detention was made under section 13D(1) pending her removal from Hong Kong. In December 1993, the Refugee Status Review Board confirmed the decision to refuse her refugee status, and made a further order for her detention under section 13D(1) pending her removal from Hong Kong.

While in detention, she met the man who eventually became her husband. He was accorded refugee status in 1991, and was resettled in Canada in 1992. They married in 1994 when he paid a visit to Hong Kong. He returned to Canada and is waiting for A909 to join him.

A909 did not initially apply for voluntary repatriation to Vietnam. Accordingly, her removal from Hong Kong could only be effected if the Canadian authorities were

prepared to take her or under the Orderly Repatriation Programme to Vietnam. The Canadian authorities refused to process her application for a visa as she had not been recognised as a refugee, so her removal from Hong Kong had to be effected under the Orderly Repatriation Programme. By March 1995, when the simplified procedure was introduced, her particulars had not been submitted to the Vietnamese authorities for processing, even though the Refugee Status Review Board had confirmed the decision to refuse her refugee status 15 months earlier. I assume that that was because the time for submitting her particulars to the Vietnamese authorities had not been reached according to the criteria which determined the order in which particulars were submitted.

In July 1995, her particulars were submitted to the Vietnamese authorities under the simplified procedure. The details of 1,144 detainees were included in this batch. In January 1996, further information was required by the Vietnamese authorities, and that information was supplied in April 1996 in a batch which included the particulars of 140 other detainees. The particulars were also included in the batch divided up geographically which was submitted in November 1996.

In September 1995, A909 had applied for voluntary repatriation to Vietnam. However, she withdrew that application in March 1996. She applied again ten days later. In July 1996, she was interviewed by the Vietnamese delegation in Hong Kong which interviews all applicants for voluntary repatriation. She had not been cleared for return to Vietnam by the time she was interviewed by the visiting Vietnamese delegation in December. However, following that interview, she has been cleared for return. There is therefore every prospect of her being repatriated to Vietnam in the near future, and the time which is reasonable necessary to effect her removal from Hong Kong has not expired.

The reason why it has taken so long for her to be cleared is, I think, relatively clear. Again, it relates to her address. Before coming to Hong Kong, she lived with her parents at 418/2 Minh Phung, Phung 9, Quan 11, Than Pho, Ho Chi Minh City. That was the address she gave to the immigration officer who interviewed her on her arrival, and it is the address recorded for her in the arrival form. It corresponds with the address on her Vietnamese identity card, which she claims (and I have no reason to doubt) she produced on her arrival. However, the address given as her present address before her departure from Vietnam on the form used under the simplified procedure was 118/3 Duong Mac Van, 8 Phung, Quan Quan 11, Than Pho, Ho Chi Minh City. Accordingly, I infer that the reason why the Vietnamese authorities requested further information about her in January 1996 was because they could not verify the address which had been given to them as her address. Despite that, this address was repeated as her address when the further information was submitted in April 1996. It was only in November 1996 that both addresses were given, and within a month she had been cleared for return.

Where had the Immigration Department got the address at 118/3 Duong Mac Van from? According to the screening documents, she gave her address at the screening interview as 118/3 Duong Mac Van, 12 Phung, Quan 8, Ho Chi Minh City. So the address which was sent to the Vietnamese authorities did not even marry up with the

address she gave at the screening interview. No explanation has been given as to why the Immigration Department did not submit (until November 1996) the address she had given on arrival. In summary, therefore, (a) the address she gave on arrival (which was her correct address) was not given until November 1996, (b) the address which was given did not even tally with the address she gave during the screening interview, and (c) that incorrect address was given when further information was sought.

On these facts, I have reached the conclusion that if the address which she had given on arrival had been given to the Vietnamese authorities in July 1995, she is likely to have been cleared for return to Vietnam much earlier. Since no explanation has been given for not giving that address until November 1996, the Director has not satisfied me that reasonable steps have been taken to ensure that her removal from Hong Kong would be achieved within a reasonable time. I therefore declare that her continued detention under section 13D(1) is unlawful for that reason, even though her return to Vietnam is imminent. I order her immediate release.

I should add that hers is a case in which the Immigration Department may think it right, now that she is to be released from detention, to defer her repatriation to Vietnam for the time being. Rather than burden this already lengthy judgment with the reasons for that, I urge the Immigration Department to consider carefully the contents of para.15 of her 3rd affirmation.

(10) Ly Vi Vien (A954)

Ly Vi Vien was born in 1978. He came to Hong Kong with his uncle in June 1990 when he was 12. An order for his detention was made under section 13D(1) pending a decision to grant or refuse him refugee status. In May 1993, he was refused refugee status, and a further order for his detention was made under section 13D(1) pending his removal from Hong Kong. In February 1994, the Refugee Status Review Board confirmed the decision to refuse him refugee status, and made a further order for his detention under section 13D(1) pending his removal from Hong Kong.

He did not initially apply for voluntary repatriation to Vietnam. Accordingly, his removal from Hong Kong could only be effected under the Orderly Repatriation Programme. By March 1995, when the simplified procedure was introduced, his particulars had not been submitted to the Vietnamese authorities for processing, even though the Refugee Status Review Board had confirmed the decision to refuse him refugee status 13 months earlier. Once again, I assume that that was because the time for submitting his particulars to the Vietnamese authorities had not been reached according to the criteria which determined the order in which particulars were submitted.

In May 1995, his particulars were submitted to the Vietnamese authorities under the simplified procedure. The details of 1,052 detainees were included in this batch. In December 1995, the Immigration Department was informed that A954 had been cleared for return to Vietnam. In fact, that information, which came via the UNHCR, was incorrect. The Vietnamese authorities had not cleared him for return. In June 1996,

further information was required by the Vietnamese authorities, and that information was supplied in August 1996. His particulars were also included in the batch divided up geographically which was submitted in November 1996.

In August 1996, A954 applied for voluntary repatriation to Vietnam. He has not yet been interviewed by the Vietnamese delegation based in Hong Kong which interviews all applicants for voluntary repatriation. However, he was interviewed by the visiting Vietnamese delegation in December. He has not yet been cleared for return, and a response is awaited from the Vietnamese authorities.

The reason why A954 has not yet been cleared for return is not clear. There is a slight difference between (a) the address given by him or his uncle on his arrival in Hong Kong and during his screening interview (which he claims was his correct address), and (b) the address submitted to the Vietnamese authorities, but I doubt whether the difference would have prevented the Vietnamese authorities from verifying the particulars given. A954 himself admits that the address submitted to the Vietnamese authorities "appears to be next door" to the correct address. However, two other addresses were given in the information provided in August and November 1996. One of them was his grandfather's address, and the other is one he does not recognise. I do not know where those addresses came from, though his grandfather's address must have come from the interview by the Immigration Department of him or his uncle. But even if these addresses should not have been given, I doubt whether he would have been cleared by the time he was interviewed in December.

In all the circumstances, the Director has satisfied me that all reasonable steps have been taken to ensure that his removal from Hong Kong would be achieved within a reasonable time. I am also satisfied that there is a reasonable prospect of him being cleared for return, simply because there is no compelling reason why he should not be cleared. The delegation which interviewed him gave no indication of any problem. When his clearance comes, it is likely to be soon. Accordingly, the time which is reasonably necessary to effect his removal from Hong Kong has not yet expired.

(11) Ly A Cuu (A1122)

Ly A Cuu was born in 1963. He came to Hong Kong with his wife in December 1990. An order for his detention was made under section 13D(1) pending a decision to grant or refuse him refugee status. In September 1993, he was refused refugee status, and a further order for his detention was made under section 13D(1) pending his removal from Hong Kong. In May 1994, the Refugee Status Review Board confirmed the decision to refuse him refugee status, and made a further order for his detention under section 13D(1) pending his removal from Hong Kong.

A1122 did not initially apply for voluntary repatriation to Vietnam. Accordingly, his removal from Hong Kong could only be effected under the Orderly Repatriation Programme. By March 1995, when the simplified procedure was introduced, his particulars had not been submitted to the Vietnamese authorities for processing, even

though the Refugee Status Review Board had confirmed the decision to refuse him refugee status 10 months earlier. Once again, I assume that that was because the time for submitting his particulars to the Vietnamese authorities had not been reached according to the criteria which determined the order in which particulars were submitted.

In July 1995, his particulars were submitted to the Vietnamese authorities under the simplified procedure. The details of 1,042 detainees were included in this batch. In August 1996, further information was required by the Vietnamese authorities, and that information was supplied in September 1996 in a batch which included the particulars of 77 detainees. His particulars were also included in the batch divided up geographically which was submitted in November 1996.

At the beginning of November 1996, A1122 applied for voluntary repatriation to Vietnam. He has not yet been interviewed by the Vietnamese delegation based in Hong Kong which interviews all applicants for voluntary repatriation, but he was interviewed by the visiting Vietnamese delegation in December. He has not yet been cleared for return, and a response is awaited from the Vietnamese authorities.

There are two possible reasons why A1122 has not yet been cleared. The first may be that the Vietnamese authorities do not regard him as a Vietnamese national. Although he was issued with a Vietnamese identity card, and although his nationality was given as Vietnamese on his marriage certificate, his father was issued with a Foreign Resident's Permit. A copy of it was provided by his solicitors to the Immigration Department in September 1996. A1122 claims that he did not produce a copy of it earlier because it had only been issued in 1994, but an examination of it appears to show that it was in fact issued in 1989. Be that as it may, I do not know whether a copy of it was sent to the Vietnamese authorities. But if it was, that could explain why he has not yet been cleared. Indeed, even if it was not, it is possible that the Vietnamese authorities discovered the issue of the Foreign Resident's Permit to his father when they were processing the particulars submitted in July 1995.

I cannot tell what the visiting Vietnamese delegation will recommend in his case, but a large number of detainees to whose relatives such a permit has been issued have been cleared for return, and in some of those cases the Vietnamese authorities must have known about the issue of such permits. There is every prospect of a decision being made in his case soon, and therefore a prospect of him being cleared for return then. Accordingly, the time which is reasonably necessary to effect his removal from Hong Kong has not yet expired.

The second possible reason why A1122 has not yet been cleared relates to his address. On his arrival in Hong Kong, he gave his address in Vietnam as 34/47A Quan Su, Phuong 13, Quan 11, Than Pho, Ho Chi Minh City. A1122 says that this information was correct. That was where he had been living in Vietnam, and it was where he had Ho Khau for. Indeed, that is the address on his Vietnamese identity card and his marriage certificate. However, when his particulars were submitted to the Vietnamese authorities, his address was given as Duong Ton Thai Hiep, Phuong 13, Quan 11, Than Pho, Ho Chi

Minh City. I do not know whether Duong Ton Thai Hiep is the same as 34/47A Quan Su, but I can see where the address at Duong Ton Thai Hiep came from. It was the address purportedly given by A1122 at his screening interview. Indeed, the words "34/47A Quan Su" were crossed out in the screening documents, and the words "Duong Ton Thai Hiep" substituted for them. Accordingly, the screening documents suggest that at the screening interview A1122 was disavowing 34/47A Quan Su as his correct address, and wanted Duong Ton Thai Hiep to be treated as his correct address. If that is right, no fault can be attached to the Immigration Department in submitting that address to the Vietnamese authorities.

However, A1122 has never had a chance to deal with that. The screening documents were included in a bundle of documents which I was provided with in the middle of the hearing only. It would not be right for me to assume that he had given Duong Ton Thai Hiep as his correct address in the screening interview without giving him the opportunity to file evidence on the topic. Accordingly, in his case, I propose to adjourn his application for a writ of habeas corpus for such evidence to be filed on the topic as the parties wish.

(12) Hoang Thi Kien (A1379)

Hoang Thi Kien first came to Hong Kong in August 1989. She was not granted refugee status, and in February 1993, she was repatriated to Vietnam under the Voluntary Repatriation Scheme. She came to Hong Kong again in May 1995. An order for her detention was made under section 13D(1) pending a decision to grant or refuse her refugee status. In April 1996, she was refused refugee status, and a further order for her detention was made under section 13D(1) pending her removal from Hong Kong. She did not apply for a review of that decision by the Refugee Status Review Board.

A1379 applied for voluntary repatriation to Vietnam a week or so after her arrival in Hong Kong for a second time. She withdrew that application in January 1996, but again applied for voluntary repatriation in April 1996. In November 1996, she was cleared for return by the Vietnamese authorities, and she was repatriated to Vietnam on 2nd December 1996.

That is all the information which I have about her. If she had not been repatriated to Vietnam, the evidence which I would have had about her would no doubt have been much fuller. In these circumstance, it would not be right for me to express any view as to whether her detention would have become unlawful by now had she not been repatriated to Vietnam.

CONCLUSION

These, then, are the reasons for the conclusions I have reached. I have already given three of the test Applicants leave to withdraw their applications for writs of *habeas corpus*: A4, A687 and A1379. Of the other nine Applicants, I declare the continued detention of four of them to be unlawful, and I have ordered their immediate release from

detention: A1, A15, A336 and A909. I declare the continued detention of four of them to be lawful, and I refuse to order their release from detention: A55, A526, A867 and A954. As for A1122, I adjourn his application for a writ of *habeas corpus*, and I shall hear representations in a moment as to when the adjourned hearing should take place.

I now turn to the other 1,364 Applicants whose cases were adjourned *sine die* on 19th November. 458 of them had been repatriated to Vietnam by 23rd January. I give leave to them to withdraw their applications for writs of *habeas corpus*, and the same applies to any of the Applicants who have been repatriated since then. The same also applies to A888, the one Applicant who has been permitted to remain in Hong Kong. However, the applications of those Applicants other than the test Applicants who are still in detention must be restored for hearing. I recognise that the parties will need time to consider the impact of this judgment on their cases, and I shall hear representations in a moment as to when the adjourned hearing of their cases should take place.

That disposes of the application before me, though in conclusion there are three things I should like to say:

(i) It would not be right for this judgement to be reported in such a way that it gives false expectations to those asylum-seekers from Vietnam who are still in detention. It is true that I have found the continued detention of four of the Applicants to be unlawful, but on the issues of principle which this case has raised, I have not found either the fact of their detention or its length unlawful. I have only found their detention to be unlawful because in three individual cases the Immigration Department did not take all reasonable steps within its power to ensure that the Applicants' removal from Hong Kong would be achieved within a reasonable time, and because in two individual cases I was not satisfied that there was a reasonable prospect of them being returned to Vietnam in the foreseeable future.

(ii) At an earlier stage in these proceedings, it was suggested that the inclusion of so many applicants in this application was inappropriate, in view of the focus in *habeas corpus* proceedings on the circumstances of the individual detainee. That concern has proved to be completely unjustified. Indeed, the course that these proceedings have taken has shown that the Applicants' claims could not sensibly have been considered by the court in any other way.

(iii) The many issues of fact and law which this case has raised made it a difficult case to try. In addition, because individual liberty was at stake, the case had to be heard relatively quickly. Counsel and solicitors responded to the challenge in an exemplary manner, and I wish to express my personal thanks to them for assisting me so comprehensively in my task.

(Brian Keith)
Judge of the High Court

Representation:

Ms. Gladys Li Q.C. and Mr. Philip Dykes, instructed by Messrs. Pam Baker & Co., for the Applicants

Mr. Nicholas Bradley, Senior Crown Counsel, for the Respondents